SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 661

LEO AWOTIN, PETITIONER,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO

ON WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FEBRUARY TERM, A. D. 1934.

LEO AWOTIN, *Defendant in Error,* vs. ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation, *Plaintiff in Error.*	Error to Circuit Court, Cook County. Honorable A. W. SUMMERS, Judge Presiding.

TRANSCRIPT OF RECORD.

1 PLACITA.

3 Praecipe filed August 19, 1930.

4 Summons issued August 19, 1930.

7 Declaration filed September 5, 1930.

Declaration contains the common counts and the following special count:

"For That Whereas, Also, the defendant, ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation, on to-wit: November 1st, 1929, at Chicago, Illinois, offered to sell to this plaintiff Thirty-five Thousand ($35,000.00) Dollars First National Company Collateral Trust, Series "O" First Mortgage Real Estate 5½% Gold Bonds in denomination of One

Thousand ($1,000.00) Dollars each, and then and there promised that if this plaintiff purchased said bonds and paid therefor, the sum of Thirty-five Thousand ($35,000.00) Dollars, together with the accrued interest thereon, it, the defendant, would repurchase from the plaintiff the said bonds at maturity paying therefor par value of the bonds and accrued interest thereon; and the plaintiff, in consideration thereof did, on, to-wit: November 1, 1929, pay to the said defendant the sum of to-wit: Thirty-five Thousand ($35,000.00) Dollars, and purchased from the defendant the said bonds, and in evidence of the promise and agreement entered into by the plaintiff and the defendant, the said defendant reduced its said agreement into writing, and as an inducement to the plaintiff to purchase said bonds from the said defendant, and as a further consideration thereof, the said defendant, delivered to the plaintiff in writing its promise and agreement to re-purchase the said bonds as aforesaid, which agreement is in words and figures as follows, to-wit:

"Daniel M. Healy, President.
Daniel J. Healy, Vice-Pres.
J. H. Jones, Vice-Pres.
M. F. Schiavone, Vice-Pres.
P. Malakates, Vice-Pres.
E. M. Blankenheim, Cashier
E. J. Nordholm, Asst. Cashier

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO
Capital and Surplus $240,000.00
CHICAGO, ILL.

Nov. 1, 1929.

Mr. Leo Awotin
1920 S. Halsted St.
Chicago, Illinois.
Dear Sir:

This is to acknowledge that we have this day sold you thirty-five thousand ($35,000.00) Dollars, par value First National Company, collateral Trust, Series "O" First Mortgage Real Estate 5½% gold bonds, in denominations of $1,000.00 each, numbered as follows: #4584-4585 and 4612 to 4644 inclusive.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000.00 and accrued interest.

Yours very truly,
B. M. BLANKENHEIM,
Cashier.

BMB—R
Member
Federal Reserve System
Chicago Clearing
House Association"

that said bonds above mentioned matured on, to-wit, July 15, 1930, that this plaintiff presented said bonds to the defendant on, to-wit, July 15, 1930, and demanded that it repurchase the same and pay this plain-

tiff the sum of Thirty-five Thousand ($35,000.00) Dollars and the accrued interest due on said bonds; that the defendant refused to repurchase said bonds, and although this plaintiff has made repeated demands subsequent to July 15, 1930, upon the defendant to repurchase the said bonds in accordance with said agreement, yet the defendant, though requested, has not paid the sum of $35,000.00 and accrued interest, or any part thereof to the plaintiff, but refuses so to do; to the damage of the plaintiff of $38,000.00, and therefore he brings his suit, etc.

LEO AWOTIN,
By HUME & KENNEDY,
Attorney for Plaintiff.

(Reverse Side.)

Plaintiff's Affidavit of Amount Due.

State of Illinois, }
County of Cook. } ss.

THOMAS C. KENNEDY, being first duly sworn, says: That the demand of the plaintiff in the above entitled cause is for the sum of thirty-seven thousand eighty-five and 41/100 ($37,085.41) dollars due and owing from the defendant to the plaintiff under its written agreement dated November 1, 1929, and that there is due to the plaintiff from the defendant after allowing to it all just credits, deductions and set-offs thirty-seven thousand and eighty-five and 41/100 ($37,085.41) dollars.

THOMAS C. KENNEDY.

SUBSCRIBED and SWORN to before me this 4th day of September, 1930.

(Seal) KENNETH E. MOBERLY.

11 Appearance and demand for jury by ELBRIDGE W. RICE, attorney for defendant, ATLAS EXCHANGE NATIONAL BANK.

15 Plea filed September 10, 1930:

And the defendant, by E. W. Rice, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

ELBRIDGE W. RICE,
Attorney for said Defendant.

"State of Illinois, }
County of Cook. } ss.

"Daniel M. Healy, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to plaintiff from defendant the sum of Thirty-seven Thousand Eighty-five dollars and forty-one cents ($37,085.41), or any other sum whatsoever; that said defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in said declaration or in the affidavit thereto attached.

DANIEL M. HEALY.

Subscribed and sworn to before me this 10th day of September, A. D. 1930.

STEPHEN L. RUFF,
Notary Public."

17 September 28, 1930, notice of placing case on trial calendar filed.

19 Additional plea filed March 24, 1931, as follows:

"And for a further plea in this behalf, the defendant says that the defendant is a national bank, organized under the national banking laws of the United States of America; that neither its charter nor the general law gives to the defendant any power or authority whatever to guarantee payment of the indebtedness or any other person, firm or corporation, nor to repurchase bonds at maturity, and that the supposed guarantee or repurchase agreement of said B. M. Blankenheim, cashier, as set forth in the declaration is *ultra vires* and void. And this the defendant is ready to verify; wherefore it prays judgment, etc.

ELBRIDGE W. RICE,
Attorney for Defendant."

"State of Illinois, }
County of Cook. } ss.

DANIEL M. HEALY, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to the plaintiff from defendant the sum of thirty-seven thousand eighty-five and 41/100ths ($37,085.41) dollars, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empowered anyone to execute the same and that said supposed agreement is *ultra vires* and void.

DANIEL M. HEALY.

Subscribed and sworn to before me this 23rd day of March, A. D. 1931.

STEPHEN L. RUFF,
Notary Public."

24 Replication filed March 31, 1931.

26 Verdict finding issues for defendant in first trial filed March 31, 1931.

28 Instruction of court to find issues for defendant and motion for new trial by plaintiff.

30 May 23, 1931, motion for new trial and for arrest of judgment by plaintiff overruled and judgment for defendant. Appeal prayed and allowed.

32 June 18, 1931, appeal bond of plaintiff approved and filed.

36 July 6, 1931, plaintiff's bill of exceptions filed.

38 Stipulation *re*: bill of exceptions.

40 Mandate of Appellate Court filed March 21, 1932, reversing and remanding the judgment entered May 23, 1931.

42 Substitution of Shulman, Shulman & Abrams as attorneys for plaintiff in place of Hume and Kennedy.

46 Judgment order entered April 15, 1932, recites the matter comes on to be heard on motion of plaintiff's attorneys to strike affidavit of merits for insufficiency upon the remandment and reversal by the Appellate Court in accordance with the opinion rendered by it and for a judgment as of default on the affidavit of claim, finds that the affidavit of merits does not state any defense and orders that affidavit of merits be stricken. Further finds that from plaintiff's affidavit of claim dated September 4, 1930, there was then due plaintiff Thirty-Seven Thousand Eighty-Five Dollars and Forty-One Cents ($37,085.41), and that plaintiff is entitled to interest thereon at 5% from that date amounting to the sum of Two Thousand Seven Hundred Fifty-Six Dollars and Twenty Five Cents ($2,756.25), making a total amount of Thirty-Nine

Thousand Eight Hundred Forty-One Dollars and Sixty-Six Cents ($39,841.66), which the plaintiff is entitled to recover from defendant, for which amount judgment is given and execution ordered. Exception to the entry of the order is taken by defendant and an appeal to the Appellate Court prayed and allowed.

Bill of exceptions filed June 13, 1932, as follows:

Hearing before Judge Thomas S. Taylor pursuant to notice from plaintiff's attorneys to defendant's attorneys that plaintiff will ask that defendant's affidavit of merits be stricken because of failure to state a meritorious defense and that judgment be entered on plaintiff's affidavit of claim, that damages be assessed to include interest from September 4, 1930, at the legal rate in addition to the amount stated in affidavit of claim, making the total amount of the judgment to be entered Thirty-Nine Thousand Eight Hundred Forty-One Dollars and Sixty-Six Cents ($39,841.66). Judge Taylor directed that the motion be presented before Judge Arthur W. Summers, then hearing Judge Taylor's law calendar. April 9, 1932, the parties by their attorneys appeared before Judge Summers and plaintiff's attorneys moved the court to strike defendant's affidavit of merits from the files because of failure to state a meritorious defense and that judgment be entered as in case of default on the affidavit of claim attached to the declaration.

Hearing continued to April 15, 1932, on which date the cause was again heard on the motion to strike defendant's affidavit of merits, which was as follows:

"State of Illinois, }
County of Cook. } ss.

DANIEL M. HEALY, being first duly sworn, deposes and says that he is President of the above named defendant and its duly authorized agent in this behalf; that there is not owing to the plaintiff from the defendant the sum of Thirty-Seven Thousand Eighty-Five and 41/100ths ($37,085.41) Dollars, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empowered anyone to execute the same and that said supposed agreement is *ultra vires* and void.

DANIEL M. HEALY.

Subscribed and Sworn to before me this 23rd day of March, A. D. 1931.

STEPHEN L. RUFF,
Notary Public."

Whereupon the court ordered that the said affidavit of merits be stricken from the files, to which action of the court in so striking the said affidavit of merits from the files the said defendant then and there duly excepted. And thereupon the said plaintiff, by its said attorneys moved the court to enter a judgment in behalf of the plaintiff and against the defendant as of default on plaintiff's affidavit of claim, which said affidavit of claim is in words and figures as follows:

"Plaintiff's Affidavit of Amount Due.

Circuit Court of Cook County

September Term, A. D. 1930

Leo Awotin

vs.

Atlas Exchange National Bank of Chicago, a corporation.

State of Illinois, } ss.
County of Cook. }

Thomas C. Kennedy, being duly sworn, says that the demand of the plaintiff in the above entitled cause is for the sum of Thirty-Seven Thousand Eighty-Five and 41/100 Dollars ($37,085.41), due and owing from the defendant to the plaintiff under its written agreement dated November 1, 1929, and that there is due
51 the plaintiff from the defendant after allowing to it all just credits, deductions and set-offs Thirty-Seven Thousand Eighty-Five and 41/100 Dollars ($37,085.41).

Thomas C. Kennedy.

Subscribed and sworn to before me this 4th day of September, 1930.

Kennedy E. Moberly,
Notary Public."

Whereupon the court on the said 15th day of April, A. D. 1932, entered a judgment in behalf of the plaintiff and against the defendant in the sum of Thirty-Nine Thousand Eight Hundred Forty-One Dollars and Sixty-Six Cents ($39,841.66), to which action of the court in entering judgment as aforesaid the defendant duly excepted.

Whereupon said defendant prayed an appeal to the Appellate Court of Illinois, for the First District, which

appeal was allowed upon the filing of an appeal bond in the sum of Forty-Five Thousand ($45,000.00) Dollars within thirty (30) days, and a bill of exceptions within sixty (60) days.

Certificate of trial judge, dated June 13, 1932.

52 Stipulation to incorporate into the record the original bill of exceptions.

54 Order approving bill of exceptions.

56 Writ of error from Appellate Court of Illinois to Circuit Court of Cook County filed December 30, 1933.

57 Certificate of clerk.

58 ASSIGNMENT OF ERRORS.

And now comes the Atlas Exchange National Bank of Chicago, the plaintiff in error, by Elbridge W. Rice, its attorney, and says that in the record and proceedings and in rendering the judgment aforesaid on the 15th day of April, A. D. 1932, there is manifest error, in this, to-wit:

1. The Court below erred in striking defendant's affidavit of merits from the files.
2. The Court below erred in entering judgment on plaintiff's affidavit of claim.
3. The Court below erred in rendering a judgment in favor of the plaintiff and against the defendant.
4. The judgment rendered on April 15, 1932, is contrary to the law.

By reason whereof the plaintiff in error prays that said judgment may be reversed.

ELBRIDGE W. RICE,
Attorney for Atlas Exchange National Bank of Chicago, a corporation, Plaintiff in Error.

13 At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-four within and for the First District of the State of Illinois.

Present Hon. John J. Sullivan, Presiding Justice.
" " Martin M. Gridley, Justice.
" " Kickham Scanlan, Justice.

Sheldon W. Govier, Clerk. William D. Meyering, Sheriff.

No. 37307	Leo Awotin, Defendant in error, vs. Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in error.	Appeal from Error to Cook Circuit.

Be It Remembered, That heretofore on the 5th day of December, A. D. 1933, it being one of the days of said December Term, A. D. 1933, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

14 At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of December in the year of our Lord One Thousand Nine Hundred and Thirty-three within and for the First Distrtict of the State of Illinois.

Present:
Hon. David F. Matchett, Presiding Justice.
Hon. William H. McSurely, Justice.
Hon. John M. O'Connor, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

Court met pursuant to law.
Court opened by proclamation.

And afterwards, on the 28th day of December A. D. 1933, there was filed in the office of the Clerk of said Court the Peoples Praecipe for a Writ of Error and Writ of Scire Facias, which said Praecipe is in the words and figures following, to-wit:

15 PRAECIPE

State of Illinois,
Appellate Court } ss.
First District

To the February Term, A. D. 1934.

Leo Awotin,
(*Plaintiff*), *Defendant in Error*

vs.

Atlas Exchange National Bank of Chicago, a Corporation,
(*Defendant*), *Plaintiff in Error.*

Gen. No. 37307
Error to the Circuit Court of Cook County.
Nisi Prius Gen. No. B-204985
Nisi Prius Judge Arthur W. Summers.

The Clerk will please issue a writ of Error in the above entitled cause, directed to the Clerk of the Circuit Court of Cook County. Also issue a Writ of Scire Facias to the Sheriff of Cook County, commanding him to summon the said Defendant in Error, as provided by law.

This was an action of trespass on the case on promises in the Circuit Court of Cook County, Illinois, wherein judgment was rendered on the 15th day of

April A. D. 1932 and at the March Term of said Circuit Court, on the law side thereof in favor of said plaintiff, Leo Awotin, and against said defendant, Atlas Exchange National Bank of Chicago, a Corporation for Thirty-Nine Thousand Eight Hundred Forty One & 66/100 ($39,841.66) Dollars besides costs of suit.

ELBRIDGE W. RICE,
Attorney for Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

To Sheldon W. Govier,
Clerk of the Appellate Court,
First District, Illinois.

16 And afterwards on the same day, to-wit: the 28th day of December A. D. 1933, there was issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Writ of Error in said cause directed to the Clerk of the Circuit Court of Cook County, which said Writ of Error is in the words and figures following, to-wit:

17 State of Illinois
Appellate Court
of the First District } ss.

THE PEOPLE OF THE STATE OF ILLINOIS.

To the Clerk of the Circuit Court for the County of Cook, Greeting:

Because, In the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County, before the Judge

thereof, between Leo Awotin, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the aforesaid Atlas Exchange National Bank of Chicago, a Corporation, as we are informed by its complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Appellate Court the Records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Chicago, in the County of Cook, on or before twenty days before the first Tuesday of February next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

Witness, The Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

SHELDON W. GOVIER,
(Seal) *Clerk of the Appellate Court of the First District.*

18 And afterwards on the same day to-wit: the 28th day of December A. D. 1933, there issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Writ of *Scire Facias* in said cause directed to the Sheriff of Cook County to execute, which said *Scire Facias* with the return of the

Sheriff thereon endorsed is in the words and figures following, to-wit:

19 State of Illinois }
Appellate Court } ss.
First District }

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County before the judge thereof, between Leo Awotin, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the said Atlas Exchange National Bank of Chicago, a Corporation, Defendant, as we are informed by its complaint, the record and proceedings of which said judgment we have ordered to be brought into our Appellate Court, of the First District, State of Illinois, at Chicago, before the Justices thereof, to correct the errors in the same in due form and manner, according to law.

Therefore, We Command You, That by good and lawful men of your county, you give notice to the said Leo Awotin that he be and appear before the Justices of our said Appellate Court, at the next term of said Court, to be holden at Chicago, in said State, on the first Tuesday in February A. D. 1934, to hear the record and proceedings aforesaid, and the errors assigned if he shall see fit, and further to do and receive what said Court shall order in this behalf; and have you then and there the names of those by whom you shall give the said notice, together with this writ.

Witness, Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

SHELDON W. GOVIER,
Clerk of the Appellate Court of the First District, Illinois.

(Seal)

Pd 2.50
M 1.00

State of Illinois } ss.
Cook County }

Served this writ on the within named defendant Leo Awotin by reading the same to him, and at the same time delivering a copy thereof to him this 6th day of January, 1934.

WILLIAM D. MEYERING,
Sheriff,
By EDWARD J. MOREN,
Deputy.

20 And afterwards on the 19th day of January A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

21 In the Matter of the Assignment of Cases to the Second Division, Appellate Court, First District, Illinois. } February Term, A. D. 1934 Calendar

On the Court's own motion it is ordered that the following numbered cases on the February Term Calendar, A. D. 1934 of said Court be and the same are hereby assigned to the Second Division Appellate Court for hearing and determination, to-wit:

37307: *Leo Awotin* v. *Atlas Exchange National Bank of Chicago, a Corp.*

And afterwards, on the 13th day of February, A. D. 1934, it being one of the days of the February Term, A. D. 1934 the Appearance of the Defendant in error was filed in the words and figures following, to-wit:

APPEARANCE

22 State of Illinois, Appellate Court, First District } ss. February Term, A. D. 1934.

Leo Awotin
Gen. No. 37307
vs.
Atlas Exchange National Bank of Chicago, a Corporation.

Appeal from .....
Error to Cook Circuit

I hereby enter the appearance of Leo Awotin and my appearance as attorney for said Leo Awotin in the above entitled cause.

LLOYD C. WHITMAN,
Attorney for Leo Awotin.

22 And afterwards on the 16th day of February A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

23 Leo Awotin,
Defendant in Error
37307 *vs.*
Atlas Exchange National Bank of Chicago,
Plaintiff in Error.

Error to Cook Circuit.

This day came Defendant in error by his counsel and moved the Court to extend the time to and in-

cluding March 19th, A. D. 1934 in which to file his briefs in said cause as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards on the 6th day of March A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

24

Leo Awotin, *Defendant in error*	Appeal from
37307 *vs.*	.....
Atlas Exchange National Bank of Chicago, a Corp., *Plaintiff in error.*	Error to Cook Circuit.

This cause having this day been reached in the call of the docket, and counsel not desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by Plaintiff in error and brief of Defendant in error due March 19, 1934.

And afterwards, on the 7th day of March A. D. 1934 the following proceedings were had and entered of record in said cause, to-wit:

25	Leo Awotin, *Defendant in error,* 37307 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.
	Rose Kimen, *Defendant in error,* 37308 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

This day came Defendant in error by his Counsel and moved the Court to consolidate cause General Number 37308 for hearing in this Court with cause General Number 37307 in this Court and that the briefs filed and to be filed in cause General Number 37307 stand and be taken and considered as the briefs filed in cause General Number 37308 as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 3rd day of April A. D. 1934, it being one of the days of the April Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

26

Leo Awotin,
Defendant in error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in error.

Error to Cook Circuit.

This day came Plaintiff in error by its counsel and moved the Court to advance the above entitled cause for an early decision in this Court as per petition filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 10th day of April A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

27

Leo Awotin,
Defendant in error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

Error to Cook Circuit.

Rose Kimen,
Defendant in error,

37308 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation.

Error to Cook Circuit.

This day came Defendants in error by their Counsel and moved the Court that the above entitled cause be

placed on the Oral Argument Calendar of this Court as per suggestions filed herein. And the Court being fully advised in the premises doth grant said motion. It is therefore ordered by the Court that said causes be and the same are hereby placed upon the Oral Argument Calendar of this Court.

And afterwards on the 1st day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

28

37307	Leo Awotin, *Defendant in error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.
37308	Rose Kimen, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

On motion of Defendant in error this day made in open Court for leave to file a Supplemental Brief in said cause instanter and that Plaintiff in error be granted leave to file an additional Reply Brief within 10 days. It is ordered by the Court that said motion be and the same is hereby allowed.

And afterwards on the 15th day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

29

	Leo Awotin, *Defendant in error,*	
37307	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	

	Rose Kimen, *Defendant in Error,*	
37308	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	

This day came Defendants in error by their Counsel and moved the Court that the suggestions hereto attached stand and be taken as an additional brief of Defendants in error herein or that the Defendants in error be granted leave to file an additional brief in said cause within 3 days as per suggestions and affidavit filed herein. And the Court being fully advised in the premises doth order that the additional suggestions hereto attached stand and be taken as an additional brief of the Defendants in error herein.

And afterwards on the same day, to-wit: the 15th day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

30	Leo Awotin, *Defendant in error,*	
37307	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	

	Rose Kimen, *Defendant in Error,*	
37308	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	

This day came Plaintiff in error by its counsel and moved the Court for leave to file the additional suggestions hereto attached as an answer to the suggestions of the Defendant in error as per suggestions filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 15th day of June A. D. 1934, it being one of the days of the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

31

Leo Awotin, *Defendant in Error,*		
37307 *vs.*		Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error,*		Appeal from .....

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed,

And it is further considered by the Court that the said Plaintiff in error recover of and from the said Defendant in error its costs, by it in this behalf expended in this Court and in the Circuit Court of Cook County to be taxed, and that it have execution therefor.

32 And afterwards on the 26th day of June A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

33

	Leo Awotin, *Defendant in Error,*	
37307	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	

	Rose Kimen, *Defendant in Error*	
37308	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	

The Court having considered the motion of Defendants in error for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause as per petition and affidavit filed herein, and being now fully advised in the premises doth order that said motion be and the same is hereby denied.

And afterwards on the 27th day of June A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

34 *In re* Publication of Written Decisions of This Court

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 15th day of June A. D. 1934, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions.

37307: { Leo Awotin *vs.* Atlas Exchange National Bank of Chicago, a Corp.

And afterwards on the 3rd day of July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

35

37307	Leo Awotin, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.
37308	Rose Kimen, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for leave to Appeal shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion, and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the same day to-wit: the 3rd day July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

36

Leo Awotin,
Defendant in Error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

} Error to Cook Circuit.

Rose Kimen,

37308 *vs.*

Defendant in Error,
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error

} Error to Cook Circuit.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a Writ of Certiorari to review the judgment of this Court in said cause shall have expired, without any such petition having been filed, and if such petition for said Writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the 16th day of August, A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

37

Leo Awotin,
Defendant in Error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error,

Error to Cook Superior.

On this day in vacation after the June Term A. D. 1934 came Defendant in error by his Counsel and moved the Honorable John J. Sullivan, one of the Justices of said Court, to substitute Samuel A. and Leonard B. Ettelson as Attorneys for Defendant in error herein in said cause, in lieu of Lloyd C. Whitman as per withdrawal and substitution filed herein. And the undersigned being fully advised in the premises doth order that said motion be and the same is hereby allowed.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And afterwards on the same day to-wit: the 16th day of August A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

38

Leo Awotin,
Defendant in Error

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error

Error to Cook Circuit.

On this day in vacation after the June Term A. D. 1934 came Leo Awotin, Defendant in error in said cause and Plaintiff in the Circuit Court of Cook County, and moved the Honorable John J. Sullivan, one of the Justices of said Court, for the issuance of the Certificate of this Court that there is fairly involved in the claim of the said Leo Awotin, Defendant in error aforesaid more than Fifteen Hundred Dollars ($1500.00) as per affidavit filed herein. And the undersigned being fully advised in the premises is of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1500.00) is fairly involved in the claim of the said Leo Awotin, Defendant in error herein and Plaintiff in the Circuit Court of Cook County.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And heretofore, on the 15th day of June, A. D. 1934, it being one of the days of the June Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

39

37307	Leo Awotin, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Circuit Court, Cook County.

Mr Justice Gridley Delivered the Opinion of the Court.

On December 28, 1933, the defendant, Atlas Exchange National Bank of Chicago, sued out the present writ of error to reverse a judgment order of the circuit court, entered April 15, 1932, in substance as follows:

> This cause coming on to be heard upon plaintiff's motion to strike defendant's affidavit of merits for *insufficiency* "upon the remand of the cause upon the reversal thereof by the appellate court for the first district in accordance with the opinion rendered by it," and "for a judgment as of default on the affidavit of claim," and it appearing that "the affidavit of merits does not state any defense to plaintiff's cause of action" and that the court is therefore entitled to strike said affidavit of merits, it is "Therefore Ordered that said affidavit of merits • • • is hereby stricken from the files in this cause."
>
> And it further appearing from plaintiff's affidavit of claim, dated September 4, 1930, that there was due to plaintiff at said date the sum of $37,085.41, and that plaintiff is entitled to interest at 5 per cent on said sum from the date of the affi-

davit of claim to this day, which has been computed to be the sum of $2,756.25; and that the total damages sustained by plaintiff, and herein assessed against defendant, amount to the sum of $39,841.66; and that plaintiff is entitled to recover said total sum from defendant.

"WHEREUPON it is considered by the court that plaintiff have and recover of defendant his damages in the sum of $39,841.66;" and that the clerk of this court issue an execution in favor of plaintiff and against defendant "on the judgment herein now entered as aforesaid."

This is the second time the cause has been before us. From our former opinion (*Awotin* v. *Atlas Exchange National Bank,* 265 Ill. App. 238), it appears that plaintiff's action against defendant (commenced August 19, 1930) is in *assumpsit;* that during March, 1931, on the issues made by the pleadings, the cause came on for trial before a jury; that at the conclusion of plaintiff's evidence the court, on defendant's motion, directed the jury to return a verdict in *defendant's* favor, which they did; that on May 23, 1931, judgment was entered upon the verdict against plaintiff for costs and he appealed to this court; and that on February 23, 1932, for reasons stated in the opinion, we reversed the judgment and remanded the cause, generally and without specific directions. In the opinion we outlined the pleadings, including the accompanying affidavits, as follows (pp. 239-41):

"Plaintiff's declaration consisted of a special count and the common counts. In the special count he alleged that on November 1, 1929, at Chicago, defendant offered to sell to him '$35,000 Dollars First National Company Collateral Trust, Series O, First Mortgage Real Estate 5½% Gold Bonds in denominations of $1,000 each, and then and there promised that, if plaintiff purchased the

bonds and paid therefor the sum of $35,000, together with accrued interest thereon, it (defendant) would repurchase the bonds at maturity, paying therefor the par value of the bonds and accrued interest;' that plaintiff, in consideration thereof, on November 1, 1929, paid to defendant said sum and purchased the bonds from it; that to evidence the agreement defendant reduced the same to writing and, as an inducement to plaintiff to purchase the bonds, then and there delivered to plaintiff the following writing:

Nov. 1, 1929.

'Mr. Leo Awotin,
1920 S. Halsted Street, Chicago.

Dear Sir:

This is to acknowledge that we have this day sold you $35,000 par value First National Company, Collateral Trust, Series O, First Mortgage Real Estate 5½% gold bonds, in denomination of $1,000 each, numbered as follows: #4584-4585 and 4612 to 4644, inclusive.

[Should you desire to resell these bonds to us, we hereby agree to repurchase same at maturity at par, or $35,000 and accrued interest.]

Yours very truly,

B. M. BLANKENHEIM,

Cashier.'

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $35,000 and accrued interest; that defendant refused so to do; and that although plaintiff has made repeated demands on defendant since July 15, 1930, to the same effect it has not repurchased the bonds or paid to him the $35,000 and accrued interest or any part thereof, but still refuses. To plaintiff's damage, etc.

41 In plaintiff's affidavit of amount due, attached to the declaration, and dated September 4, 1930, it is stated that his demand 'is for the sum of $37,085.41, due and owing to plaintiff from defendant *under its written agreement, dated November 1, 1929,* and that there is due from defendant after allowing to it all just credits, deductions and set-offs $37,085.41.'

Defendant entered its appearance by attorney, demanded a jury trial, and filed a plea of the general issue. In the accompanying affidavit of merits of Daniel M. Healy he alleged that he is the president of defendant, that there is not owing to plaintiff any sum of money, and that 'defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in the declaration or in the affidavit thereto attached.' On the eve of the trial defendant by leave of court, filed an additional plea alleging that it is a national bank, organized under the banking laws of the United States, that 'neither its charter nor the general law gives to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation nor to repurchase bonds at maturity,' and that the supposed guarantee or repurchase agreement of said Blankenheim, cashier, as set forth in the declaration, 'is *ultra vires* and void.' To this additional plea plaintiff filed a replication."

It also appears from the present record that there accompanied said additional plea an affidavit of merits, signed and sworn to by said Healy, stating:

"That there is not owing to plaintiff from defendant the sum of $37,085.41, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empowered anyone to execute the same; and that said supposed agreement is *ultra vires* and *void.*"

And the bill of exceptions discloses that on April 9, 1932, after the mandate of this court had been filed, an attorney for plaintiff appeared in the circuit court, after notice to defendant, and moved the court "to strike defendant's affidavit of merits from the files because of its *failure to state a meritorious defense*, and that judgment be entered against defendant, as in case of default, on the affidavit of claim attached to plaintiff's declaration;" and that on April 15, 1932, after arguments of respective counsel, the court granted the motion and entered the judgment now in question against defendant as first above mentioned.

In our former opinion, we quoted a portion of subsection 7 (as amended February 25, 1927) of Section
42 5136 of the U. S. Revised Statutes, relating to the powers, etc. of National Banks, as follows:

> "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title: *Provided*, That the business of buying and selling *investment securities* shall hereafter *be limited* to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association, or corporation, in the form of *bonds*, notes and/or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency, * * *."

We then stated the contentions of respective counsel as follows (p. 243):

> "Counsel for the bank contended in the trial court and contends here that under the above statute no recovery can be had by plaintiff in the present action, because the agreement of November 1, 1929, sued upon, is *ultra vires* the bank and wholly void. Counsel for plaintiff contend in substance that the court erred in entering the judgment (following the directed verdict) because:
>
> (1) The sale of the bonds by the bank to plaintiff, coupled with its written agreement to repurchase them at maturity at par and accrued interest amounts to a *conditional sale,* which is valid as such and the statute has no application; and
>
> (2) Even if it be considered that the bank in making the repurchase agreement acted *ultra vires,* plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor plus accrued interest on an *implied* assumpsit,—the bank having retained the moneys it received in the transaction."

And we expressed the opinion (p. 244), after considering the written agreement of November 1, 1929, the arguments of respective counsel and numerous adjudicated cases, that the trial court had erred in instructing the jury as it did and in entering the judgment against plaintiff. We then discussed said two contentions of plaintiff's counsel and expressed the opinion that there was substantial merit in each. As to the first contention we cited and quoted from the cases of *Wolf* v. *National Bank of Illinois,* 178 Ill. 85, 93-5, and *Freedman* v. *Madison & Kedzie State Bank,* 259 Ill. App. 519, 523-4. As to the second contention we cited and quoted from several cases decided by the
43 Supreme Court of the United States. And we also discussed, and decided adversely to it, defendant's fur-

ther contention that there could be no recovery by plaintiff in the case upon an *implied* promise or agreement.

After considering the pleadings and plaintiff's evidence and the stipulation introduced upon the *first* trial (as outlined on pages 241-2 of our former opinion), we think that it may reasonably be inferred that the trial court, in directing the jury to return a verdict in defendant's favor and in entering the judgment, was of the opinion that no recovery could be had by plaintiff on the repurchase agreement sued upon because such agreement was *ultra vires* the Bank and void upon grounds of public policy. And we also think that it may reasonably be inferred that the court, in taking the action it did on the *second* hearing, after remandment of the cause, and in entering the judgment of April 15, 1932, now in question, was moved to do so because of the decision and holdings in our former opinion.

On December 22, 1933 (six days before the present writ of error was sued out to reverse the judgment now in question) our Supreme Court decided the case of *Knass* v. *Madison and Kedzie State Bank*, 354 Ill. 554. In that case the first division of this appellate court, on March 6, 1933, had affirmed a decree, with certain modifications, of the superior court of Cook county (269 Ill. App. 588, 611), and the case reached the Supreme Court on appeal and certificate of importance granted. The Supreme Court reversed the judgment of the appellate court and the decree of the superior court, and remanded the cause to the superior court "with directions to dismiss complainant's bill for want of equity" (p. 572). In that case certain bonds were sold to complainants under certain "re-

purchase agreements" by the bank, which are similar to the repurchase agreement in the present case, in that it is stated in one repurchase agreement: "These
44 bonds may be cashed at any time after one year at 99 and accrued interest or in three and one-half years at par;" and in the other: "Will purchase these bonds at any time after one year at 99, and after three and one-half years at par if desired." The bank was one organized under the laws of this State, as distinguished from one organized under the laws of the United States, as is the defendant in the present case. In the opinion of the Supreme Court in the *Knass* case, after outlining the pleadings and stating certain facts, etc., it is said (p. 561): "Of first importance on this record is the question whether the repurchase agreements, assuming them to have been such and to have been made by the bank, are *ultra vires* the powers of the bank and contrary to the declared public policy of the State, and so unenforceable. This question has never been passed upon by this court."

Then follows in the opinion an exhaustive discussion of the question, accompanied with the citation of numerous adjudicated cases in this State and in other jurisdictions bearing upon it. In conclusion the Court determined the question in the affirmative. And the Court said (p. 567): "As often stated by this court, one dealing with a banking or other corporation having limited and delegated powers is chargeable with notice of those powers and their limitation." (Citing cases.) And in discussing the question whether the repurchase agreements were to be considered as being void as against public policy, the Court said in part (pp. 567-8, italics ours):

> "Are such contracts as here relied upon void as against public policy or violative of statutory

enactment? Contracts against public policy are generally unenforceable by any remedy. (Restatement of the Law of Contracts, Am. Law Ins., Sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. *Agreements such as are here involved fall within that category.* Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void *though there be found no specific statutory prohibition against them.* It is an academic rule of law that from the constitution and statutory enactments may be gleaned the public policy of the State. The General Assembly of this State in 1879 passed an act entitled 'An Act for the protection of bank depositors,' approved June 4, 1879, (Smith's Stat., 1931, Chap. 38, par. 64.) Section 4 of this act is as follows:

'It shall not be lawful for any savings bank, individual or individuals doing banking business, banking company, or incorporated bank receiving savings deposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or interest on, any bonds, notes or other evidence of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or guarantee, whereby such deposits of trust funds could be jeopardized or impaired shall be null and void.'

This section has not heretofore been construed by this court. It seems clear, however, that pay-

ment or assumption of or guaranteeing to pay bonds of the character here involved is of the gist of the prohibition of this act applicable in any case where by any such contracted liability the deposits or the trust funds of the bank could become jeopardized or impaired. The act for the protection of bank depositors evidences an intention on the part of the legislature to declare contracts of the character before us *void as against the public policy of the State.* That act, section 4 of which is herein quoted, was enacted, as the title indicates, for the protection of bank depositors. Its enactment was for the public generally and should be construed to carry out that purpose. (*People* v. *Tallmadge,* 328 Ill. 210.)"

And the Court, after disagreeing with an argument made that the quoted statute was not applicable to the particular facts, further said in part (pp. 568-9):

"The bonds are evidences of indebtedness of the corporations which owned the real estate and executed the bonds, and by these agreements the bank's undertaking is to guarantee the bonds of those corporations. The fact that the bank may have received a commission for selling them in nowise renders the mortgage bonds obligations of the bank. It follows that agreements to repurchase them at their face value, or with a deduction of one per cent for handling, as complainants construe these agreements, are agreements to assume or guarantee the payment of the evidences of indebtedness of another corporation, contrary to the express provisions of the act for protection of bank depositors. As it cannot be doubted that such an agreement could jeopardize or impair the deposits or trust funds of the bank, such contract, because of its inherent danger to deposits and trust funds and because it is contrary to the public policy of the State, as evidenced by the legislative expression in section 4 of the statute quoted, is null and void."

46 And the Court, after stating a contention of the complainants (viz., that the old bank, having received the purchase price of the bonds in question, "is *estopped* from setting up the defense of *ultra vires*") decided against the contention, saying in part (pp. 569-70, italics ours):

> "Under the established law of this State the defense of *ultra vires* is available to the old bank *when sued on a void agreement.* It is said, however, that the complainants performed and executed their part of the agreement, and that it would not be good faith to permit the bank now to refuse. The same question was raised in *Steele* v. *Fraternal Tribune, supra* (215 Ill. 190), where this court said (pp. 193-4):
>
> 'A contract of a corporation which is *ultra vires* in the proper sense of that term—that is to say, outside the object of its creation, as defined by the laws of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not only voidable, but *wholly void and of no legal effect.* The objection to the contract here is, not merely that the corporation *ought not* to have made it but that it *could not lawfully make it.* The contract could not be ratified by either party because it could not have been authorized by either. No performance by the parties could give the unlawful contract validity or become the foundation of any right of action upon it. • • • But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws. The powers delegated by the State to corporations are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot

plead his ignorance of their existence.' (Citing cases.)

"*A contract void because it is prohibited by law can in no manner be enforced.* The law does not prohibit and also enforce a contract. (Citing cases.) Complainants are chargeable with notice that the old bank was utterly without power to make these repurchase agreements. The defense of *ultra vires* is properly urged here."

And the Court discussed, and decided adversely to them, complainants' contention that the agreements involved should not be considered as "repurchase agreements" but as "conditional sales contracts." In support of the contention complainants had cited two cases,—one of which was *Wolf* v. *National Bank of Illinois*, 178 Ill. 85 (which this appellate court had referred to and relied upon in its said former opinion in the present case.) But our Supreme Court, in its opinion in the *Knass* case, said in part (pp. 570-2, italics ours):

47 "In the *Wolf* case the contention was that contracts similar in terms to those before us were options and gambling contracts. The court held, however, that the record showed that it was the intention of the parties that the purchaser was to be allowed a certain time in which to elect whether he was to keep or return them, and so the transaction was a conditional sale. *Such are not the facts here*, but it is evident that complainants and the bank considered that the sale was completed and by a separate agreement the bank agreed to repurchase the bonds. *Such does not constitute a conditional sale.* * * * The statute for the protection of bank depositors was not called to the attention of the court. *Stewart* v. *Dodson*, 282 Ill. 192 (the other case cited by complainants in the *Knass* case), involved a contract for repurchase

between individuals and no question of limitation of powers arose. * * * *These cases are not controlling here.* It seems clear here that both the evidence of the transaction itself and the theory on which the bill is brought *preclude a construction of these agreements as conditional sales contracts.* Complainants' evidence shows that they *bought the bonds outright* and that in the sale of these bonds to them the title passed. * * * Complainants also received interest on the bonds sold them, which they did not offer to return when tender was made of the bonds. The purchase price was paid in full, and what the purchasers did with the bonds lay entirely with them. They were under no obligations to return them and no condition remained to be discharged in order to pass title. They could hypothecate them, sell them elsewhere, and were in nowise required to account to the bank. *These were not conditional sales.*"

On February 5, 1934 (before oral argument of the present cause was had in this court) the Supreme Court of the United States decided the case of *Texas & Pacific Railway Co.* v. *Pottorff*. The opinion is published in the Supreme Court Reporter, Vol. 54, No. 7, at pages 416-20, and it there appears in substance that the Railway Co. filed a bill against Pottorff as receiver of a *national* bank at El Paso, Texas; that Pottorff filed a cross-bill; that after evidence heard the U. S. District Court entered a decree on his cross-bill and dismissed the bill of the Railway Co.; that the decree was affirmed by the U. S. Circuit Court of Appeals (63 Fed. 2nd, 1): and that on certiorari the Supreme Court also affirmed the decree. It is stated in the opinion that "the main question for decision is whether a *national* bank has *power* to pledge a part of its assets to secure a private deposit;" that the bank failed in September, 1931, at which time the Railway

Co. was and long prior thereto had been a depositor; that to secure it as such the bank, in January, 1931, had pledged $50,000 Liberty Bonds and held them for the Railway Co. in the bank's trust department; that
48 when the bank failed the Railway Co.'s balance in its regular checking account was $54,646, of which sum it made proof of claim as a secured creditor; that the receiver approved the amount of the claim but *denied the validity of the pledge*, and he tendered a dividend check only for the amount to which the Railway Co. would have been entitled as an unsecured creditor; that thereupon the Railway Co. filed its bill against the receiver "praying, in the alternative, that the bonds be delivered to it, or that they be sold for its benefit, or that the claim be paid in full with interest;" that the receiver in his cross-bill prayed that the bank's title to the bonds be quieted; and that the District Court in its decree held that "the pledge *was void* and that the Liberty Bonds constituted assets to be administered for the benefit of the general creditors of the bank," which decree was affirmed by the Circuit Court of Appeals. It is further stated in the opinion that the Railway Co. contended (1) "that the bank had power to make the pledge; (2) that even if the bank did not have such power, the receiver is not in a position to question the validity of the pledge; and (3) that even if he is not estopped from doing so, he may not disaffirm it *without returning the consideration therefor received by the bank.*" And the Supreme Court expressed the opinion that "none of these contentions is sound." And after setting forth certain additional facts as found by the District Court, the Supreme Court made numerous holdings, which are epitomized in the syllabi of the case as reported, in substance as follows: (1) That national banks *lack*

power to pledge their assets to secure private deposits; (2) that the measure of powers of such banks is statutory grant, and powers *not conferred* by Congress *are denied;* (3) that the Court takes judicial notice of facts indicating that among national banks the practice of pledging assets must have been deemed *contrary to good banking practice;* (4) that a receiver
49 for an insolvent national bank is *not estopped* to deny the validity of a pledge of assets to secure a private deposit; (5) that no rights arise on an *ultra vires* contract, even though the contract has been fully performed; (6) that it is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so; and (7) that the receiver of an insolvent national bank may assert the invalidity of a pledge of assets to secure a private deposit without making restitution by paying the pledgee's claim in full. And the Court, as to the above propositions, Nos. 4 and 5, said (p. 420, italics ours):

> "The receiver is not estopped to deny the validity of the pledge. The railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. *Neither branch of the argument is well founded. The bank itself could have set aside this transaction.* It is the settled doctrine of this court that *no rights arise* on an *ultra vires* contract, *even though the contract has been performed;* and that this conclusion *cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised.*" (Citing cases.)

Counsel for the Atlas Bank, as grounds for a reversal of the present judgment, contends that the decisions and holdings in the *Knass* and *Pottorff* cases, *supra*, are decisive and controlling as to the issues here involved; that no recovery can be had by plaintiff (Awotin) by virtue of the written agreement of November 1, 1929, sued upon, and as set forth in the special count of plaintiff's declaration hereinabove mentioned; and that it should be held that the making of such an agreement was *ultra vires* the bank and against public policy and that, hence, the agreement is void and unenforceable. And counsel argues in substance that, notwithstanding the fact that in the *Knass* case the defendant was an Illinois banking corporation while in the present case defendant is a *national* bank, the respective statutes (above set forth) as to their powers, and as to the limitations on their powers, are similar, and that the decision and holdings in the *Knass* case can here properly be applied. It will be noticed that in sub-section 7 (as amended in 1927) of the National Bank Act, the proviso reads in part: "Provided, that the business of buying and *selling* investment securities shall hereafter be *limited* to buying and selling *without recourse* marketable obligations • • • in the from of bonds, notes and/or debentures, commonly known as 'investment securities,' • • •." The terms "without recourse" or "no recourse" have well settled meanings. In Anderson's Dictionary of Law, 1893, p. 865, it is said that by the use of the former stated words "the holder of negotiable paper may transfer title without incurring the responsibility of an indorser." In Webster's New International Dictionary, 1933, p. 1785, it is said that the words, "when added to the indorsement of a negotiable instrument, protect the indorser from liability to the

indorsee and subsequent holders." And in *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, 699, it is said: "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

After again considering the pleadings in the present case and the written agreement of November 1, 1929, sued upon, and in view of the decisions and holdings in said *Knass* and *Pottorff* cases, we are of the opinion that the present judgment of April 15, 1932, cannot stand because it is contrary to the law. And we are now of the belief that, when on February 23, 1932, on the former appeal, we entered our former
51 judgment (reversing the former judgment of the circuit court in favor of defendant and remanding the cause generally), we acted erroneously.

One of the contentions here made by counsel for plaintiff is that our holdings and decision on said former appeal are "binding" upon us in the present writ of error cause. In other words the contention is in substance that, under the rule or doctrine of the "Law of the Case," we should affirm the present judgment. We cannot agree with the contention. In 2 R. C. L., p. 226, sec. 188, in discussing the limitations of the general rule, the writer says: "The better rule, and that more in accord with justice, however, is that though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably erroneous it is competent for the court to cor-

rect it on the second appeal. This may be said to be the view which has for its support the trend of modern authority, * * *." In *Zerulla* v. *Supreme Lodge*, 223 Ill. 518, it was decided that a proposition of law laid down by an appellate court of Illinois, upon reversing a judgment *generally* and remanding the cause, is not binding upon that court upon a second appeal, where the Supreme Court has since the first appeal decided the point involved contrary to the proposition laid down. And the Court said (pp. 519-20, italics ours):

> "Plaintiff in error contends that the law of the case was settled and announced by the appellate court the first time the case was before that tribunal and before the decision of this court in the *Seitzinger* case (204 Ill. 58) was filed, and that the law as announced by the appellate court at that time must govern the future progress and determination of this case. * * * The judgment and order of the appellate court" (on the first appeal to it, 99 Ill. App. 630, 637), "reversing and remanding the case was general in its terms and contained no directions to the trial court. It was neither final nor conclusive between the parties, no appeal could have been prosecuted from it, and it was, therefore, not *res adjudicata*. (Citing cases.) Where the appellate court or this court, on the first appeal to it, announces a particular view of the law governing the case and reverses and remands the case for further proceedings in accordance with the views announced, if the case
52 is again brought before such court for review the former decision is binding on the court making it, and the questions decided and determined by it on the first appeal are not open for reconsideration on the second appeal. But while the determination of a question of law by the appellate court on the first appeal may, as a general rule, be binding upon it on the second appeal, it certainly cannot be binding on this court. *Nor would the appel-*

late court on the second appeal, we apprehend, *be obliged to adhere* to a proposition of law laid down on the first appeal, when this court had, *since the first appeal,* decided the *precise question* contrary to the rule announced by the appellate court. *To so hold would lead to most illogical results.*"

Reference may also be made to other adjudicated cases bearing upon the question: *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Johnson* v. *Cadillac Motor Car Co.,* 261 Fed. Rep. (C. C. A.) 878, 886; *City of Hastings* v. *Foxworthy,* 45 Neb. 676, 699; *Missouri, etc. Ry. Co.* v. *Merrill,* 65 Kan. 436, 451. In the *Messenger* case it is said (p. 444, italics ours): "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power.*" In the *Johnson* case (p. 886) it is said, "We recognize the full force and effect of the doctrine of *stare decisis* and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not again be considered. * * But the rule is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society."

Another contention of plaintiff's counsel is in substance that the circuit court on the second hearing properly struck for insufficiency defendant's affidavit of merits (which accompanied its additional plea to plaintiff's declaration), and properly entered the judgment of April 15, 1932, now in question, for the rea-

son that the affidavit stated "mere conclusions and not the essential facts." In our opinion the contention
53 is lacking in merit. The affidavit is set forth in a foregoing paragraph of this opinion. It alleges *inter alia* that "there is not owing to plaintiff from defendant the sum of $37,085.41, or any other sum whatsoever," and that the agreement, set forth in plaintiff's declaration is "*ultra vires* and *void*." No question was raised as to the sufficiency of the affidavit at or prior to the time of the first trial. And on the second hearing, as appears from the present judgment order, first herein mentioned, plaintiff's motion to strike said affidavit for insufficiency was apparently based "upon the remandment of the cause upon the reversal thereof by the appellate court for the first district in accordance with the opinion rendered by it." Furthermore, we think that the affidavit was sufficient to give notice to plaintiff that one of the defenses to plaintiff's action was that the repurchase agreement sued upon was *ultra vires* the bank to make, and *void* in law and, hence, unenforceable. There was sufficient notice of the nature of the defense. (See, *Firestone Tire Co.* v. *Ginsbury*, 285 Ill. 132, 136; *Thayer* v. *Belender*, 250 Ill. App. 16, 22; *Runyan* v. *Moon*, 267 Ill. App. 312, 314.)

Plaintiff's counsel also contends that "even if it be considered that the bank in making the repurchase agreement acted *ultra vires*, plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit*." It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *as-*

sumpsit after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Potorff* case, *supra*, it is the settled doctrine of the Supreme Court of the United States that "no rights arise on an *ultra vires* contract even though the
54 contract has been performed." This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra*, (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* "without tendering to plaintiff the money defendant received from plaintiff" is equally without merit.

After this cause had been orally argued by respective counsel, we allowed plaintiff's counsel to file certain typewritten suggestions on points mentioned and arising on said oral argument and thereafter certain counter suggestions were filed by defendant's counsel. We have reviewed these suggestions but are of the opinion that a discussion of them is here unnecessary in view of the record before us and the decisions and holdings in said *Potorff* and *Knass* cases, *supra*.

Our conclusions are that the circuit court erred in entering against defendant the judgment of April 15, 1932, in question; that said judgment should be reversed; and that as the law will not allow any recovery to be had by plaintiff against defendant on the repurchase agreement of November 1, 1929, sued upon and as set forth in plaintiff's declaration, the case will not be remanded. Accordingly, the judgment is reversed.

REVERSED.

SULLIVAN, P. J., and SCANLAN, J., CONCUR.

55 And afterwards on the 31st day of October A. D. 1934, it being one of the days of the October Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court, a certified copy of an order of the Supreme Court of Illinois, denying the petition for Leave to Appeal in said cause, which same order is in the words and figures following, to-wit:

56 United States of America }
State of Illinois } ss.

At a Supreme Court, Begun and held in Springfield, on Tuesday the Second day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-four, within and for the State of Illinois.

Present: the Honorable Norman L. Jones, Chief Justice Honorable Clyde E. Stone, Justice Honorable Frederic R. DeYoung, Justice Honorable Warren H. Orr, Justice Honorable Lott R. Herrick, Justice Honorable Paul Farthing, Justice Honorable Elwyn R. Shaw, Justice Otto Kerner, Attorney General Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be It Remembered, that to-wit: on the 23rd day of October A. D. 1934, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

PETITION FOR LEAVE TO APPEAL FROM FIRST DISTRICT.

OCTOBER 23, A. D. 1934.

LEO AWOTIN,
Petitioner.

No. 22749 *vs.* B. 204983-37307.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
Respondent.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and Keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Supreme Court in Springfield, in said State, this 30th day of October in the year of

Our Lord one Thousand nine hundred and Thirty-four.

Adam F. Bloch,

(Seal) *Clerk of the Supreme Court.*

I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and Keeper of the records, files and seal thereof, Do Hereby Certify, that the foregoing pages numbered 1 to 11 inclusive are a true copy of the Abstract of Record filed by the Plaintiff in error in the case of *Leo Awotin, Defendant in Error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in Error,* in said Appellate Court on January 17th, A. D. 1934.

I further certify that the foregoing pages 12 to 56 inclusive are a true, full and complete Transcript of the Record of proceedings of said Appellate Court in the case of *Leo Awotin, Defendant in Error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in Error,* of record in my office, and also of the opinion of said Appellate Court rendered herein and filed in said cause on the 15th day of June A. D. 1934, and also a certified copy of the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal in said cause which was filed in said Appellate on the 31st day of October A. D. 1934, in said cause, as all of the same now appear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of said Appellate Court, this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-four.

Sheldon W. Govier,

Clerk of the Appellate Court,

(Seal) *First District, Illinois.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

JAN 22 1

CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL A. ETTELSON,
EDWARD C. HIGGINS,
Attorneys for Petitioner.

CHICAGO LAW PRINTING CO., 107 N. WACKER DRIVE · TEL. FRANKLIN 6521 ·

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No.

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Now comes Leo Awotin and respectfully petitions this Honorable Court to grant a writ of *certiorari* to the Appellate Court of Illinois, First District, and to remove therefrom to this Court for review the record in the case lately pending in the said Appellate Court entitled, *Leo Awotin* v. *Atlas Exchange National Bank of Chicago, a corporation,* being case No. 37307, on the docket of the said Appellate Court of Illinois. The Supreme Court of Illinois denied your petitioner's Petition for Leave to Appeal on October 23, 1934. (Rec. p. 53)

A duly certified record is filed herewith under separate cover and includes all of the proceedings in the Circuit Court of Cook County where said cause was tried, in the Appellate Court of Illinois, First District, in which Court the respondent herein, the said Atlas Exchange National Bank of Chicago, prosecuted a writ of error to review the judgment of the trial court, and in the Supreme Court of Illinois, in which your petitioner filed his said Petition for Leave to Appeal from the judgment of said Appellate Court of Illinois.

I.

Statement of facts and proceedings.

Your petitioner respectfully represents unto this Honorable Court that this cause was before the Appellate Court of Illinois, First District, on the pleadings. In the interest of brevity your petitioner will summarize the proceedings and the pertinent facts will appear therefrom.

Your petitioner respectfully represents unto this Honorable Court that in the trial court he was the plaintiff and the respondent was the defendant.

The action is in assumpsit and the declaration contains a count in special assumpsit upon a written contract. The following is alleged in substance: The payment by your petitioner of Thirty Five Thousand Dollars ($35,000) in consideration of the delivery by the respondent to your petitioner of thirty-five (35) One Thousand Dollar ($1,000) par value First National Company real estate bonds and a written agreement by the respondent to repurchase the same at maturity, paying therefor the par value of said bonds and accrued interest thereon, and further alleging the breach of said contract. (Rec. p. 1)

The declaration also contained the common counts in general assumpsit. (Rec. p. 1)

Your petitioner filed with his said declaration an affidavit of claim, pursuant to the Illinois Practice Act of 1907 (Cahill's Illinois Revised Statutes, 1931, Chapter 110, paragraph 55). The affidavit stated, in substance, that the nature of your petitioner's demand was upon said written contract to repurchase from your petitioner said bonds, as aforesaid. (Rec. p. 4)

To said declaration the respondent filed two pleas: (1) The general issue, and (2) a special plea alleging that said written contract was *ultra vires* the respondent under the National Bank Act. (Rec. p. 6)

With each of said pleas, the respondent filed the requisite affidavits of defense, the one filed to the special plea alleging, in substance, that the respondent was a National Bank organized under the National Banking laws and that it had no authority, under said banking laws, to make this agreement. (Rec. p. 6)

The Circuit Court of Cook County, after a trial, entered a judgment in favor of said respondent, from which judgment your petitioner appealed to the Appellate Court of Illinois, First District. Said Appellate Court reversed said judgment and remanded said cause to the trial court. (Rec. p. 7) The decision of the Appellate Court of Illinois on said appeal is reported in 265 Ill. App. 238.

After said cause was redocketed in the Circuit Court of Cook County, that Court, on April 15, 1932, struck the respondent's affidavit of meritorious defense filed with its special plea, on the ground of its insufficiency in law, and entered a judgment, as upon default, in favor of your petitioner and against the respondent for the sum of Thirty

Nine Thousand Eight Hundred Forty One Dollars and Sixty Six Cents ($39,841.66), together with your petitioner's costs of suit. (Rec. p. 7) (Cahill's Illinois Revised Statutes, 1931, Chap. 110, par. 55)

On December 28, 1933, the respondent sued out a writ of error in the Appellate Court of Illinois, First District, to review the said judgment of the Circuit Court of Cook County, and, thereafter, on, to wit, June 15, 1934, the said Appellate Court of Illinois, First District, reversed the said judgment of said Circuit Court of Cook County and, without remanding said cause to the trial court, entered its own judgment against your petitioner. (Rec. p. 25)

On June 26, 1934, the said Appellate Court of Illinois denied the motion of your petitioner for a certificate of importance and an appeal to the Supreme Court of Illinois. (Rec. p. 26)

On October 23, 1934, the Supreme Court of Illinois denied to your petitioner leave to appeal to said Supreme Court of Illinois from the judgment of the Appellate Court of Illinois, First District, (Rec. p. 53) and by virtue of sub-section (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Illinois Revised Statutes, 1933, chapter 110, paragraph 203), the said judgment of the Appellate Court of Illinois became final.

Since it is discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on Petition for Leave to Appeal, and since the Supreme Court of Illinois has denied your petitioner's said Petition for Leave to Appeal, a writ of *certiorari* from this Court should be addressed to the Appellate Court of Illinois, First District, commanding it to certify and to send to this Court the record of the proceedings in said cause. The limit of time for the making of such application in this Court runs from

the date when the Petition for Leave to Appeal was denied by the Supreme Court of Illinois, the highest tribunal in the State of Illinois in which a decision in this cause can be had, on October 23, 1934.

American Railway Express Co. v. *Levee*, 263 U. S. 19, 20.

II.

Reasons for the allowance of the writ.

Your petitioner further respectfully represents that he is aggrieved by the final judgment of the Appellate Court of Illinois and the final order of the Supreme Court of Illinois, wherein said Supreme Court of Illinois denied your petitioner's Petition for Leave to Appeal from said judgment of the Appellate Court of Illinois; that the matters at issue are wholly of a Federal nature and are of peculiar gravity and importance in that the said Appellate Court of Illinois has decided a Federal question of substance under the National Bank Act (44 Stat. 1226) not heretofore determined by this Honorable Court and, further, in that said Appellate Court of Illinois has decided a Federal question of substance under said National Bank Act in a way probably not in accord with the applicable decisions of this Honorable Court.

A.

Specifications of error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred in finding and holding that the respondent had no power or authority

under the National Bank Act as then in force (44 Stat. 1226) to make and enter into the repurchase agreement sued upon and set forth in your petitioner's declaration, and in finding and holding that by reason thereof said contract was *ultra vires* and void, and that no recovery could be had thereon.

2. The Appellate Court of Illinois erred in not finding and holding that the respondent had the power and authority under the National Bank Act as then in force (44 Stat. 1226) to make and enter into the repurchase agreement sued upon and set forth in your petitioner's declaration, and in not finding and holding that said contract was within the corporate power of said respondent, and that your petitioner could recover thereon.

3. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that your petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by your petitioner to said respondent in reliance upon said void contract and agreement.

4. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that your petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by your petitioner to said respondent in reliance upon said void contract and agreement.

B.

Summary of points relied upon for reversal of judgment.

I. The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty Five Thousand Dollars ($35,000), the Thirty Five Thousand Dollars ($35,000) First National Company Collateral Trust, Series "O," First Mortgage Real Estate 5½% Gold Bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

A. The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

B. The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

C. Even if the repurchase agreement is construed as a guaranty, it is an incidental power of the respondent as a National Bank to make a contract of guaranty for its own benefit.

II. The respondent, having received the benefits of the repurchase contract is estopped to plead its want of authority to enter into such an agreement.

III. Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strength of said agreement.

III.

Jurisdiction of this Court.

Your petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

First National Bank, etc. v. *Alexander Anderson,* 172 U. S. 573.

Leander J. McCormick v. *Market National Bank of Chicago,* 165 U. S. 538.

Logan County National Bank v. *Townsend,* 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that it is within the jurisdiction of this Court to entertain this petition and to issue its writ of *certiorari* as herein prayed.

Chicago & Eastern Illinois R. R. Co. v. *Industrial Commission of Illinois,* 284 U. S. 296, 297.

Chesapeake & Ohio R. R. Co. v. *Mihas,* 280 U. S. 102, 104.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock,* 279 U. S. 410.

American Railway Express Co. v. *Levee,* 263 U. S. 19.

IV.

Prayer.

For the purpose of correcting the errors complained of and to the end that the rights of your petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of *certiorari* may be issued under the seal of this Court directed to the Appellate Court of Illinois, First District, commanding it to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and proceedings of said Appellate Court in the within case, to the end that the judgment of said Appellate Court of Illinois, First District, may be reviewed by this Court, as provided by law and that the judgment of the Appellate Court of Illinois may be reversed by this Honorable Court and that your petitioner may have such other relief as to this Court may seem appropriate.

LEO AWOTIN,
Petitioner.

SAMUEL A. ETTELSON,

EDWARD C. HIGGINS,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No.

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

I.

The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty Five Thousand Dollars ($35,000), the Thirty Five Thousand Dollars ($35,000) First National Company Collateral Trust, Series "O," First Mortgage Real Estate 5½% Gold Bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

A.

The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

The National Bank Act of 1922, as amended by the Act of February 25, 1927, c. 191, sec. 2; 44 Stat. 1226, which was in force at the time when the respondent sold the First National Company bonds to the petitioner, provided as follows:

> "• • • The association shall become • • • a body corporate, • • • and it shall have the power—
>
> "*Third.* To make contracts. • • •
>
> "*Seventh.* To exercise • • • all such incidental powers as shall be necessary to carry on the business of banking; • • • Provided, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations, evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities • • •."

Under the authority of this statute, the respondent Bank was empowered to buy and sell without recourse the bonds in question and enter into contracts. The respondent had statutory power for every element involved in the instant transaction.

B.

The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

The term "without recourse" has a definite legal denotation, namely: without guaranteeing the performance of a third party's obligation; or without liability on the obligation of a third party upon his failure to perform.

With this definition before us, let us examine the written contract of November 1, 1929. For the convenience of the Court we will set forth the contract, which reads as follows:

"ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO
Capital and Surplus $240,000
Chicago, Ill.

Nov. 1, 1929.

Mr. Leo Awotin,
1920 S. Halsted St.
Chicago, Illinois.

Dear Sir:

This is to acknowledge that we have this day sold you thirty-five thousand ($35,000) Dollars, par value First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5½% Gold Bonds, in denominations of $1,000 each, numbered as follows: Nos. 4584-4585 and 4612 to 4644 inclusive.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000 and accrued interest.

Yours very truly,

B. M. Blankenheim,
Cashier."

There is not one word in the agreement which hints at a guaranty or which provides recourse against the respondent; the respondent does not, by this agreement, undertake to pay the bonds in the event that the First National Company fails to do so. The respondent's obligation to repurchase the bonds is in no wise conditioned upon the failure of the First National Company to pay them when they matured. It is clear from the language of this contract that the respondent's obligation thereunder is to repurchase these bonds upon the demand of your petitioner, independently of the performance or non-performance by the maker of its obligation to pay them at their maturity. The essential element of a guaranty is, therefore, lacking, and there is no justification for reading that element into the contract.

Viewed from another aspect, we respectfully submit to the Court that the respondent's agreement cannot be construed as affording recourse against it.

The respondent must be regarded as having been the owner of the bonds which it sold to the petitioner. Selling property is an act of ownership, unless the contrary is shown. *Farmers and Merchants State Bank* v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308. There is no such showing in the record of this case.

Being the owner of the bonds, the respondent sold them upon the condition which, in substance, provided that if the petitioner desired to do so, he could return them and receive back from the respondent the purchase price which it received and retained as part of its assets. In short, the sale was subject to defeasance upon a condition subsequent.

Wolf v. *National Bank of Illinois*, 178 Ill. 85.
Ubben v. *Binnian*, 182 Ill. 508.

Kantzeler v. *Bensinger*, 214 Ill. 589.
Stewart v. *Dobson*, 282 Ill. 192.
Freedman v. *Madison & Kedzie State Bank*, 258 Ill. App. 519 (*certiorari* denied, 259 Ill. App. XIV.)

Viewed thusly, it cannot be said that the agreement in question was a guaranty of the bonds or afforded recourse against the respondent. It merely permitted the petitioner to be placed in *statu quo* if he so desired. The respondent would again become the owner of the bonds which it formerly owned and the petitioner would have his money back. As long as the respondent had the authority to buy the bonds in the first instance, it must have the authority to buy them from the petitioner. Especially must this be true, when the respondent's agreement was an inducement to the petitioner to pay Thirty Five Thousand Dollars ($35,000) for the bonds.

The Appellate Court, in holding void the repurchase agreement in this case, relied upon the decision of the Illinois Supreme Court in *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554. This decision apparently, but not in fact, overruled the last cases cited by us, but it is clearly distinguishable upon its facts from the case at bar.

In the *Knass* case, *supra*, 354 Ill. 554, when the Madison & Kedzie State Bank sold the bonds to the petitioner and agreed to repurchase them, it was acting as a broker for the maker of the bonds. As a broker, the bank did not retain the purchase price of the bonds, but turned it over to its principal, less a broker's commission. Under these facts, when the bank was called upon to repurchase the bonds, it could not be placed in *statu quo* as the respondent would have been if it had performed the obligations of

its agreement. In the *Knass* case, the bank, if it repurchased the bonds, would not be able to use the money it had received from the original sale and which had been turned over to the maker.

We respectfully submit that in this case the respondent was authorized in its charter to buy and sell the bonds in question without recourse; the contract of November 1, 1929, did not guarantee or afford recourse against the respondent, but it merely permitted the petitioner to return the bonds and obtain from the respondent the money which he had paid to it and which the respondent retained. We, therefore, respectfully submit that this contract was not *ultra vires*, but squarely within the granted powers of the respondent bank.

C.

Even if the repurchase agreement is construed as a guaranty, it is an incidental power of the respondent as a National Bank to make a contract of guaranty for its own benefit.

Although we believe that the repurchase agreement in this case cannot be construed as a guaranty, yet we may assume for the purpose of arguing this point, that the contract was a guaranty of the bonds which the respondent sold. However, even with this assumption, we believe that the agreement was not *ultra vires* or beyond the power of the respondent bank under the National Bank Act.

This Court has held that a National Bank may enter into a contract of guaranty for its own benefit.

People's Bank v. *Manufacturers' National Bank*, 101 U. S. 181.

To the same effect are the following Federal and State court decisions:

Farmers' & Miners' Bank, et al. v. *Bluefield National Bank, et al.*, 11 Fed (2d) 83, 85 (*certiorari* denied, 46 S. Ct. 483).

Farmers and Merchants State Bank v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308.

Citizens' National Bank v. *Good Roads Gravel Co.*, 236 S. W. 153 (Tex.).

Clearly, if, as we have assumed for the purpose of arguing this point, the repurchase contract is deemed to be a guarantee of the bonds sold to the petitioner, it is for the benefit of the respondent bank.

We have already shown to the Court that upon the record in this case the respondent must be regarded as having been the owner of the bonds which it sold. Being the owner, the power and authority to guarantee the payment of the bonds must be regarded as incidental to the power to sell them. Such an incidental power is a benefit to the bank for the reason that it permits it to offer an inducement to a prospective purchaser. It is able to offer this inducement without creating any liability in excess of the asset or assets which it has received by reason of the making of the guaranty. When the bank has performed its contract, it merely exchanges bonds for money which it had received in the first instance from the sale of the bonds.

II.

The respondent, having received the benefits of the repurchase contract is estopped to plead its want of authority to enter into such an agreement.

Again if we assume for the purpose of this argument that the contract in question made the sale of the First National Company Bonds to the petitioner a sale with recourse, and constituted a guaranty of the bonds, the respondent could not avail itself of the defense of *ultra vires*.

The statute gives to the respondent the authority to buy and sell investment securities without recourse. To sell them with recourse would be only *an abuse of granted power* and the respondent, having received the benefits of a contract made only in excess or in abuse of its *granted powers*, is estopped to plead the defense of *ultra vires*.

Gibson v. *Kansas City Refining Co.*, 32 F. (2d) 658.

Standard Furniture Co. v. *Smith*, 32 F. (2d) 176.

Grand Valley, etc. v. *Zummbrunn*, 272 Fed. 943.

This rule must be distinguished from that principle, laid down by this Court, to the effect that a corporation cannot be estopped from pleading the defense of *ultra vires* to an act which it had *no* authority under its charter to do. In this case the respondent had the authority and power to sell the bonds so that at the most it *abused* that *granted* power by selling the bonds with recourse.

III.

Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strenght of said agreement.

We have already pointed out to the Court that the respondent must be regarded as having been the owner of the bonds which it sold, so that when it received Thirty Five Thousand Dollars ($35,000) from the petitioner, the purchase price therefor, that money was retained by it and took the place of the bonds among the bank's assets. The respondent received the benefit from the contract.

The respondent repudiated its agreement when called upon to perform it, after having received the benefit therefrom, but it is a well-settled rule of law often decided by this Court, that a corporation, which has repudiated a contract as being *ultra vires*, will not be permitted to retain the benefits it has received under such a void agreement, and is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc. Co.*, 139 U. S. 24, 60.

Logan County National Bank v. *Townsend*, 139 U. S. 67.

Pullman Car Company v. *Central Transportation Co.*, 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank*, 176 U. S. 618.

Citizens' Central National Bank v. *Appleton*, 216 U. S. 196.

This doctrine is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract; it is predicated upon the theory that the corporation, having received money or property under a void agreement, is not, in equity and good conscience, entitled to retain the money or property and at the same time repudiate the contract.

The case of *Citizens' Central National Bank* v. *Appleton, supra*, 216 U. S. 196, is one wherein a National Bank, to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the repayment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the National Banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be more impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We

know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra*, 216 U. S. 196, is important.

In this case, the petitioner was proceeding in special assumpsit on the written contract and in general assumpsit on an implied contract. The Appellate Court held, first, that there could be no recovery on the written contract because the respondent had no authority under the banking act to make such an agreement, and, second, that the contract being *ultra vires*, the petitioner could not recover anything in general assumpsit. The Appellate Court, therefore, reversed the judgment of the Circuit Court of Cook County and, without remanding the cause, entered its own judgment against the petitioner. Upon the authority of the cases last cited by us, the petitioner is entitled to recover, in general assumpsit, the money he paid to the respondent upon the strength of and reliance upon the contract which the respondent repudiated as being *ultra vires*. The Appellate Court, therefore, should have remanded the cause to the Circuit Court, to enable the petitioner to pursue this remedy. In failing to do this, the Appellate Court deprived the petitioner of a right to which this Honorable Court has held him entitled.

CONCLUSION.

We respectfully submit to this Honorable Court that we have shown that the agreement of November 1, 1929, by which the respondent agreed to repurchase the bonds in question, was and is not *ultra vires* the respondent for the reason that it was expressly authorized under the National Bank Act to buy and sell these bonds without recourse; that this contract did not afford recourse against the respondent, and that, even assuming that it did afford recourse, the respondent could, under the banking laws, make a contract of guaranty for its own benefit. We respectfully submit that we have shown that even if the agreement of November 1, 1929, were *ultra vires* and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the moneys paid to the respondent in reliance upon the claimed *ultra vires* and void agreement.

We, therefore, respectfully submit that the Appellate Court of Illinois, First District, erred in reversing the judgment of the Circuit Court of Cook County and also in reversing said judgment without remanding said cause to the trial court.

Respectfully submitted,

SAMUEL A. ETTELSON,

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Attorneys for Leo Awotin, Petitioner.

APPENDIX.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII:

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however,* that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen

hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

Illinois Practice Act of 1907, section 55 (Cahill's Illinois Revised Statutes, 1931, Chap. 110, Sec. 55):

"Affidavit of plaintiff's claim—Default—Defendant's affidavit of merits.) Sec. 55. If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the

amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion specifying the amount (according to the best of his judgment and belief), upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order; no affidavit of merits need be filed with a demurrer or motion: *Provided,* that this section shall not apply to any case where an executor or administrator shall defend in behalf of any estate: *And, provided, further,* that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court but expects to produce by the next term, the court shall continue such cause until the next term. If the affidavit of defense is to only a portion of the plaintiff's demand, the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor; but in such case the court may make such order as to the costs of the suit as may be equitable."

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

SAMUEL A. ETTELSON,
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Petitioner's reply to respondent's argument under Subdivision A of Point I of its brief and argument.

Counsel for the respondent has questioned the absence of the Petition for Leave to Appeal, filed in the Supreme Court of Illinois, from the transcript of record which has been filed in this Court. Under paragraph one of Rule 38 of this Court, a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed, must be filed. The record

in its technical sense is made in the trial court as was done in this case and brought up to the Appellate Court of Illinois by writ of error. The proceedings in the Appellate Court of Illinois, together with this record, are included in the transcript filed in this Court.

The absence of the Petition for Leave to Appeal from the record as it has been filed in this Court is further justified, if justification be necessary, on the ground that the issues raised therein are immaterial to this Court's jurisdiction.

We are seeking a review, not of the decision of the Supreme Court of Illinois, but of the decision of the Appellate Court of Illinois, First District, and the record affirmatively shows that a federal question arising under the National Banking Act was presented to the Appellate Court; that the decision of that question was necessary to a determination of the cause—the special pleas and affidavit of merits squarely raised the issue—and the judgment could not have been given without deciding the issue.

The opinion of the Appellate Court shows that these questions were judicially determined by that Court, and in view of the refusal of the Supreme Court of Illinois to take jurisdiction of the cause, the decision of the Appellate Court upon the federal questions presented in the record, necessarily becomes the final adjudication in the State upon such federal questions. It should be noted that this Court has said that under the Illinois practice, the refusal of the Supreme Court to assume jurisdiction is tantamount to an affirmance of the decision of the Appellate Court of Illinois.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410

No specific reason is given by the Appellate Court of Illinois (and none is required by statute) for its denial to grant petitioner's prayer for Leave to Appeal. However, the order of the Supreme Court of Illinois (Record p. 53), clearly shows that it considered the case as presented by the petition, record, abstract, brief and argument of the petitioner, and that upon due consideration thereof, the Court denied the Leave to Appeal. The element which confers jurisdiction upon this Court to issue its writ of *certiorari* as prayed, is the *denial* of the Leave to Appeal by the Supreme Court of Illinois.

American Railway Express Co. v. *Levee*, 263 U. S. 19, 21.

The case of *Lynch* v. *New York, ex rel. Pierson*, 79 L. ed. Adv. Op. 1, cited in respondent's brief at page two, is entirely without application. In that case, this Court was asked to review the decision of the New York Court of Appeals, which was the highest court in the State of New York, and from that decision it could not be determined that the court had decided the case on a federal or non-federal question.

In the case at bar, we are seeking to obtain a review of the decision of the Appellate Court of Illinois, which has become the decision of the highest Court of the State of Illinois, so far as this cause is concerned. As we have stated before, we are not seeking a review of the decision of the Supreme Court of Illinois. The essentials of the jurisdiction of this Court to review the decision of the Appellate Court of Illinois have been met.

Petitioner's reply to respondent's argument under Subdivision B of Point I of its brief and argument.

It is contended by the respondent under this subdivision of its argument that the petitioner did not pursue the

proper method of invoking the jurisdiction of the Supreme Court of Illinois; that had another method been employed, the State Supreme Court might have assumed jurisdiction, and that, therefore, this Court has no jurisdiction.

A sufficient and complete answer to this contention is found in the fact that the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal shows that the State Court had considered the petition, record, abstract, brief and argument filed by the petitioner and overruled the prayer thereof, denying "a Leave to Appeal" (Rec. p. 53). Had the petitioner herein pursued the wrong method in seeking to invoke the jurisdiction of the State Supreme Court as claimed by the respondent, the Petition for Leave to Appeal would have been *dismissed without consideration* and not denied after a consideration of the petition, record, abstract, brief and argument, as shown by the order of the said Supreme Court of Illinois.

We repeat as applicable here what we have already said in reply to respondent's argument in sub-section A of Point I of its brief, namely, that the jurisdictional element with which this Court concerns itself in applications for writs of *certiorari* is the *refusal* of the highest state court to take jurisdiction.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410

American Railway Express Co. v. *Levee*, 263 U. S. 19, 21

An analysis of the cases cited by respondent in support of its contention that this Court has no jurisdiction of

this case will instantly reveal that they are without application to the case at bar.

In *Mullen* v. *Western Springs Beef Co.*, 173 U. S. 116 (cited in respondent's brief as 123 U. S. 116), this Court held that it had no jurisdiction to review the decision of the Court of Appeals of Colorado.

It appears in that case that the Supreme Court is the highest court in the State and that it had jurisdiction to review the decision of the Court of Appeals had an application for such review been made to it; and that no such application had, in fact, been made. Clearly, this Court could not have reviewed the decision of the Court of Appeals, because it had not yet become the decision of the highest court in the State of Colorado from which one could have been had.

The case of *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, is one wherein this Court dismissed a writ of error for the reason that no federal question had been presented to the Supreme Court of South Carolina, whose judgment this Court was asked to review.

It appears that in the *Mims* case, the trial court had rejected an offer of certain evidence which raised a federal question. The State Supreme Court sustained that ruling and it is this decision sustaining the trial court that the defendant sought to have this Court review on writ of error. Under the pleadings in the case, no federal question had been raised and the offer of evidence was made at the second trial, after the plaintiff had completed her case.

Clearly, no federal question was decided either by the trial court or the Supreme Court of South Carolina. The sole question decided by the Supreme Court of South Carolina was one of the local law governing procedure.

This Court properly refused to review a decision on such a question.

In the case of *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, a writ of *certiorari* was prayed for the purpose of reviewing the decision of the Supreme Court of Missouri. This court dismissed the writ on the ground that no federal question had been presented to or decided by said Supreme Court of Missouri.

The facts in the case show that a question arising under the Constitution of the United States was raised for the first time in the appellate court, an intermediate court, in the defendant's brief and argument. The Supreme Court of Missouri held that the question was not properly raised under the law of Missouri and thus, like the Supreme Court of South Carolina in the *Mims* case, decided a question of procedure under local law and not a federal question.

Finally, the respondent cites and quotes from the case of *Newman* v. *Gates*, 204 U. S. 89, wherein this Court dismissed a writ of error to the Supreme Court of Indiana to review a decision of that Court which was that an appeal from the trial court to the appellate court, an intermediate court, was insufficient.

Again this Court properly held that it had no jurisdiction to review the decision of the Supreme Court of Indiana for the reason that it was based not upon a federal question, but purely on a matter of procedure under the local law of Indiana.

In none of the foregoing cases was a federal question decided by the Court whose decision this Court was asked to review. In the case at bar, as we have already pointed out, we are asking this Court to review a decision of the Appellate Court of Illinois, which squarely decided a federal question and which, by the Supreme Court's denial

of Leave to Appeal, became the decision of the highest court in the State of Illinois from which a decision of such federal question could be had.

Petitioner's reply to respondent's argument under Subdivision C of Point I of its brief and argument.

In spite of the fact that counsel for the respondent has attempted to minimize the importance of the federal questions involved in this case, we believe it to be apparent to this Court that a construction of the privileges and immunities of a national bank under the National Banking Act are matters of substance and that the questions here involved, namely, the validity of the repurchase agreement and the liability of a national bank upon an implied assumpsit for moneys obtained under an *ultra vires* contract, are of sufficient importance to warrant a review by this Court of the decision of the Appellate Court of Illinois.

Petitioner's reply to respondent's argument under Subdivision D of Point I of its brief and argument.

Under this subdivision of the respondent's brief and argument, the cases of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554 (*certiorari* denied by this Court, 291 U. S. 660), and *Cassatt, et al.* v. *First National Bank of West New York*, (N. J.), 168 Atl. 585 (*certiorari* denied by this Court, 291 U. S. 660), are cited to show that the decision of the Appellate Court of Illinois in the case at bar is in accord with the applicable decisions of this Court.

The *Knass* case, *supra*, 354 Ill. 544, cannot be deemed as a decision of this Court since it was dismissed for want

of a substantial federal question, nor is it applicable to the case at bar, as we will show the Court in another branch of our reply argument.

The *Cassatt* case, *supra*, 168 Atl. 585, is distinguishable for the reason that no specific authority was or is granted to a national bank to deal in stocks, as the New Jersey Court pointed out in its opinion on page 587 of the Atlantic Reporter. In the case at bar the National Banking Act grants express authority to the respondent to deal in bonds.

The *Pottorff* case, *supra*, 291 U. S. 245, cannot, by any stretch of the imagination be deemed as an authority on the question of whether the repurchase contract sued on in the case at bar is *ultra vires*, because there are no factual resemblances between the two cases. It cannot be considered as authoritative on the question of the petitioner's right of recovery upon an implied assumpsit theory, because this Court held, in effect, that even if a recovery of benefits were allowed to the complainant in that case, it could not recover the full amount of its deposit as a preference, but could share only as a general creditor of the defunct bank. We concede, as this Court said in its opinion, that no theory of estoppel could prevent the bank from raising the defense of *ultra vires* where it had no power to do the act complained of, and also that no rights arise out of an *ultra vires* contract. However, neither principle is even remotely involved in this case nor are we relying upon them.

Petitioner's reply to respondent's argument under Point II of its brief and argument.

In support of the argument made by counsel for the respondent on this branch of the case, several cases are

cited which we respectfully submit are not applicable to the case at bar and cannot be taken as authorities for the proposition that the repurchase agreement, sued on in this case, is *ultra vires.*

In the case of *Weckler* v. *First National Bank,* 42 Md. 585, the act of the National Bank, which was declared to be *ultra vires,* was the selling of bonds *as a broker on commission.* In *Hotchkin* v. *Third National Bank of Syracuse,* 219 Mass. 234, the National Bank contracted *on behalf of a client* to sell *stock* to the plaintiff, and in *First National Bank, etc.* v. *Hoch,* 89 Pa. St. 324, the National Bank there involved undertook to act as a *broker* for a client in the purchase of certain bonds.

It must be noted that in each of the cases above cited, the National Banking Act, as it then existed, did not permit, and the courts so held, national banks to act as brokers for the purchase or sale of stocks and bonds. It follows, therefore, that these cases are not analogous to the case at bar where, on the record, the respondent was acting *in its own behalf* and not as an agent or a broker for any other person.

The case of *Greene* v. *First National Bank,* 172 Minn. 310, was one wherein, prior to the 1927 amendment to the National Banking Act, a national bank agreed with a purchaser of a mortgage, to repurchase it. Under the Act as then in force, a national bank was not authorized to buy investment securities or to sell them, except that under limited circumstances it could act as a broker in selling real estate mortgages. With these facts before the Court, we respectfully submit that the repurchase agreement in the *Greene* case was *ultra vires,* not because it created a guaranty of the mortgage, nor because it created a contingent liability, the sudden maturity of which might em-

barrass the bank, *but solely because the bank had no authority to buy the security.*

Like the *Greene* case, *supra,* 172 Minn. 310, the facts of the *Knass* case, *supra,* 354 Ill. 554, show that the Illinois Banking Act (Smith-Hurd Illinois Statutes Annotated, 1935, chapter 16½, section 1), did not expressly authorize the defendant bank to buy or sell bonds or any other investment security, so that the defendant did not have any power under its charter to purchase the bonds from any one, including the plaintiff, in that case. The repurchase contract was *ultra vires* because of no authority to purchase the bonds and not because the contract constituted a guaranty.

We pointed out to this Court in our original brief that under the National Banking Act, as amended in 1927, the respondent had the express authority to buy and sell investment securities, so that the reason for declaring *ultra vires* the contracts in the *Greene* and *Knass* cases, *supra,* does not exist in the case at bar.

Counsel for the respondent in his reply brief stated that the provision in the National Banking Act is as far reaching and comprehensive as the Illinois Banking Act. We have already pointed out the vital difference between the two statutes.

It is true that the National Banking Act qualifies the power of a national bank to buy and sell investment securities. As counsel for the respondent points out, these transactions must be "without recourse." We respectfully submit that the sale of the bonds by the respondent to the petitioner was a sale "without recourse."

We pointed out in our original brief that the language of the repurchase contract in no wise conditions the respondent's liability upon the default in payment by the maker of the bonds.

We also pointed out to the Court in our original brief that on the record in this case the respondent owned the bonds which it sold to the petitioner, and counsel for the respondent admits this fact in his brief (see page 18). When the sale of the bonds was consummated, cash was substituted for the bonds, among the assets of the bank. When called upon to repurchase these bonds, the bank would then substitute the bonds for the cash it originally received. They would again resume their places among the bank's assets in lieu of the cash. Each party by this transaction would be placed in *statu quo*. The original sale to the petitioner was a completed sale, subject to defeasance, a condition of sale.

Counsel for the respondent in answer to this argument says in his brief that the *Knass* case, *supra*, 354 Ill. 554, is conclusive that this transaction was not a conditional sale, but we respectfully submit that the case is not conclusive on this point.

From the opinion in the *Knass* case (pp. 568, 569), it appears that the bank in selling the bonds had acted as a broker; the Court said: "The fact that the bank may have received a commission for selling them in no wise renders the mortgage bonds obligations of the bank," and "it will be presumed that the mortgagor, • • • received the amount paid by the claimants (complainants in the case) less commissions charged for the sale." One does not receive a commission for selling his own property. Thus, acting only as a broker or agent for the maker of the bonds who receives the purchase price, the bank, if called upon to repurchase the bonds, would be, in fact, called upon to buy bonds which it had never owned, the original purchase price for which it had never received. The situation would not be that of placing parties in *statu quo*.

The only person who could make a conditional sale under the circumstances of the *Knass* case, would be the maker of the bonds who received the consideration therefor and in whose behalf the sale was made.

The *Knass* case thus distinguished, it must clearly appear that the cases relied upon by us in our original brief as establishing our transaction as a conditional sale were not overruled by the *Knass* case, because in each of those cases, the seller was acting for its own account and not as a broker.

The Supreme Court of Illinois in its decision considered what it deemed as dangers to which the financial structure of a bank and its depositors would be subjected if a bank were permitted to enter into repurchase agreements which create contingent liabilities against which the bank is powerless to protect itself. Counsel in his brief repeats the same ideas and paints a dark picture. The dangers are more apparent than real.

Any bank selling its own bonds with an agreement to repurchase them, obtains the value of the bonds in cash and, as we have already pointed out, by performing its repurchase agreement it is merely placed in *statu quo*. The bank knows that it may be called upon to perform its contract and to repurchase the bonds, and is in a position to protect itself by setting up a reserve against such a contingency. Reserves are established against losses on bad loans and against depreciation of its fixtures and real estate, so that as a matter of actual practice and good banking, it could also protect itself against the contingency of repurchasing the bonds which it had sold. If, at the time it was called upon to repurchase the bonds, their value may have dropped, the bank's position is no worse than if it had not sold them in the first instance, or if it

had contracted to buy bonds and before their delivery their value had fallen.

The dangers thus depicted by the Supreme Court of Illinois and by counsel for the respondent may be reason for the legislature forbidding the banks to buy or own investment securities or to withhold from them the authority to do so, as in fact the Illinois legislature has done, but where Congress has authorized national banks to buy and sell and thus own securities, these apparent dangers are not valid reasons for denying to the bank the power to repurchase bonds which it once owned and which were sold in reliance upon the repurchase contract. We repeat that the power to so repurchase under such circumstances is a necessary incident to its power to sell.

We respectfully submit that the repurchase agreement sued on in this case was within the power of the respondent to make.

Petitioner's reply to respondent's argument under Point III of its brief and argument.

We have argued in our original brief that the repurchase agreement was not *ultra vires* in the sense that the respondent had *no* authority to enter into a contract of this character, but that *assuming* the agreement to be *ultra vires*, it could be so only in the sense that the bank had exercised a granted power excessively or abusively, and that under those facts it could be estopped to plead the defense of *ultra vires* since it had received the benefits of the contract.

In reply to this argument, counsel for the respondent has cited a long list of cases which hold that where a corporation has no authority to do a particular act, it cannot be estopped to plead that want of authority.

We respectfully submit that these cases and the rule laid down by them cannot control the case at bar because, as we have pointed out, the respondent had the power to buy and sell the bonds in question, and that at the most the sale with a repurchase agreement was an abuse of the granted power, and that since the respondent has received and does not offer to return the benefits of such contract, it is estopped to plead the defense of *ultra vires*.

Petitioner's reply to respondent's argument under Point IV of its brief and argument.

We now consider the answer of the respondent to our argument that even if it should be held that the respondent had no power or authority to make the repurchase agreement here in question, the Appellate Court of Illinois erred in its judgment by failing to remand the cause to the trial court in order to permit a recovery by the petitioner of the money paid by him in reliance upon the void agreement.

It is argued by the respondent that the petitioner is attempting to recover the purchase price paid for the bonds without returning them and after investment securities have greatly declined in value. Our reply to this statement is that the record does not show that the petitioner is seeking the return of his money without tendering the bonds to the respondent.

In order for the petitioner to recover the purchase price paid for the bonds in reliance upon the repurchase contract, he must prove a cause of action under his common counts and one element of that cause of action would be a tender or a willingness to return the bonds to the respondent.

Counsel for the respondent clouds the issue when he argues that the petitioner is attempting to get back money paid by him for bonds after the values of investment securities had greatly declined. There is nothing in the record of this case as to the value of the bonds in question, and what security values in general are, is of no importance. The value of these particular bonds is also of no importance *if when the petitioner paid $35,000 to the respondent, he did so in reliance upon a void agreement as the record shows the petitioner did.*

The cases which we have cited in our original brief counsel characterizes as involving questions of unjust enrichment, where a corporation has obtained money or property on its own void obligation. The facts in the case at bar bring it directly within the principle stated by counsel for the respondent. It makes no difference, however, whether the respondent sold obligations of another corporation, automobiles or any other chattel, so long as the petitioner was induced to part with his money on the strength of a void agreement, as the record in this case shows that the petitioner did.

Counsel also points out that there is no allegation that the respondent realized any profit resulting from the sale of the bonds to the petitioner. We respectfully submit that the petitioner is not attempting to recover any profit. The cause of action under the common counts is to recover the moneys paid to the respondent in reliance upon an alleged void agreement. "Benefits" and "profits" are not synonymous.

The argument upon which counsel places the greatest emphasis in an effort to defeat any right of recovery upon an implied assumpsit is that the affidavit filed by the petitioner with his declaration purports to restrict his cause of action to a recovery upon the express contract.

In support of this contention, counsel has cited several cases which we believe do not establish the principle for which counsel argues.

Before we consider these cases, we wish to call to this Court's attention that this case was before the Appellate Court of Illinois on two occasions: First, upon an appeal by the petitioner, and, second, upon a writ of error sued out by the respondent.

On the first appeal, the Appellate Court held that the repurchase agreement was not *ultra vires*, and that even if it was, the petitioner could have recovered, upon an implied assumpsit, the moneys he had paid to the respondent in reliance upon the *ultra vires* contract. *Awotin v. Atlas Exchange National Bank, etc.*, 265 Ill. App. 238.

On this first appeal, the respondent urged that there could be no recovery on the implied promise for the reason that the plaintiff's affidavit of claim showed that his cause of action or demand was based upon the written contract. The Appellate Court rejected this argument and said:

> "But defendant's counsel contends that there can be no recovery by plaintiff in this case. Under an *implied* promise or agreement, '*where the verified statement of claim* alleges an *express* promise.' Counsel refers to that portion of plaintiff's 'affidavit of amount due,' as above set forth, wherein plaintiff states that his demand is 'for $37,085.41 • • • *under its written agreement, dated Nov. 1, 1929,*' etc. In support of his contention counsel cites certain Appellate Court decisions. But we think that plaintiff's declaration, in which are included the common counts, is sufficient to warrant a recovery under an implied promise • • •. If counsel's contention be a good one,

in those cases where an affidavit of claim has been filed by a plaintiff with his declaration and an affidavit of merits by a defendant with his plea, the result would be that such cases would be tried, as said in *Cox* v. *Aetna Cas. & Surety Co.*, 261 Ill. App. 394, 399, 'upon the issues made by the affidavits instead of by the pleadings.' In our opinion there is no merit in counsel's contention."

When the Appellate Court had the case before it on the second appeal, it completely reversed its stand on this proposition, saying:

"Plaintiff's counsel also contends that 'even if it be considered that the bank in making the repurchase agreement acted *ultra vires*, plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit*.' It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *assumpit* after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Pottorff* case, *supra*, it is the settled doctrine of the Supreme Court of the United States that 'no rights arise on an *ultra vires* contract even though the contract has been performed.' This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra*, (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* 'without tendering to plaintiff the money defendant received from plaintiff' is equally without merit."

It seems quite apparent that if the Appellate Court had believed that the substantive law would have permitted the petitioner to recover on the implied assumpsit, it would not have reversed its former ruling on the procedural question. The Court, however, relying upon the case of *Texas & Pacific Railway Co.* v. *Pottorff, supra,* 291 U. S. 245, held that as a matter of substantive law the petitioner could not recover upon the implied promise and, consequently, its ruling on the procedural question was merely gratuitous. We have heretofore pointed out to this Court that nothing in its opinion in the *Pottorff* case could be deemed to prevent a recovery upon the implied contract theory.

We will briefly review the cases upon which counsel for the respondent relies in support of his contention that the petitioner is barred by his affidavit of claim from recovering upon the implied contract theory.

In *Keime* v. *Thum,* 238 Ill. App. 519, the plaintiff's cause of action was based solely upon the consolidated common counts in *indebitatus* assumpsit; in the affidavit of claim, plaintiff stated the facts upon which his cause of action was based, namely: The quantity of corn sold and delivered by the plaintiff to the defendant, the price per bushel and the agreement of the defendant to pay the said price. At the trial, plaintiff did not testify that the defendant had agreed to pay the price alleged in the affidavit. The Court said that by the plaintiff's affidavit of claim, the otherwise general common counts were limited to the facts set out in the affidavit and legal proof of them was necessary in order to support a recovery. The plaintiff, the Court held, failed to make this proof.

The facts in *Goddard Tool Company* v. *Crown, etc., Company,* 219 Ill. App. 34, show that the plaintiff's case was predicated upon a single count in special assumpsit supported by an affidavit of claim.

In *Cooper* v. *Anderson*, 264 Ill. App. 1, the Court used the language quoted by counsel for the respondent in its ruling that the affidavit of the parties so limits the issues in a case that a plaintiff need not prove averments in his affidavit which are not denied by the defendant's affidavit of merits, which admits all facts not denied.

The language of the case of *Reddig* v. *Looney*, 208 Ill. App. 413, quoted by counsel for respondent was used by the Court in deciding that under the Illinois Practice Act, under Section 55 of the Illinois Practice Act of 1907, defenses not alleged in the affidavit of merits are waived.

The case at bar presents a record entirely different than the facts in any of the foregoing cases.

It is the most elementary rule of pleading that the allegations in a declaration or in a plea control the right of recovery or the defense relied upon.

It is likewise elementary that each count is in itself a declaration, and that although two or more counts may be joined in a single cause of action, each count, nonetheless, remains a declaration.

With these principles before the Court, we look to the case at bar and find that the petitioner joined in his action against the respondent two causes of action: One for the breach of an express contract and the other for the breach of an implied contract.

It is important to note that the purpose of such joinder of causes of action is to permit a plaintiff to recover in general assumpsit anything to which, at the trial, he may have proved himself entitled, if for some reason he cannot recover upon the express contract. In short, when the common counts are joined with a special count, they act as a catchall in order to permit a recovery if the plaintiff proves any cause of action in assumpsit. 5 Corpus Juris 1399.

It is true that in the case before the Court, the affidavit of claim states that the petitioner's demand is upon a written contract, but this affidavit applied only to the petitioner's demand under the special count. In other words, the affidavit was filed to the special count alone, and there was no affidavit filed to the common counts. To hold otherwise, would be to render nugatory the very purpose of joining common and special counts. It would permit pleadings to be controlled by affidavits to an extent not contemplated by the statute (Cahill's Illinois Revised Statutes, 1931, Chapter 110, Section 55) when we consider that its purpose is to aid plaintiffs and relieve them from the delay occasioned by defendant's pleading sham defenses. *Harrison* v. *Rosehill Cemetery Company*, 291 Ill. 416, at 419, 420; *Haggard* v. *Smith*, 71 Ill. 226, *Cooper* v. *Anderson*, 236 Ill. App. 1, 5; *Reddig* v. *Looney*, 208 Ill. App. 413, 416.

The purpose of the statute being as we have stated, the affidavit of plaintiff's claim is construed as being evidenciary in character, that is, it supplies the evidence upon which the court may enter a judgment if a defendant fails to appear or to plead, or if he pleads, then if he fails to file an affidavit of meritorious defense. *Keator, etc. Co.* v. *Thompson*, 144 U. S. 436; *Kern* v. *Strasberger*, 71 Ill. 303, 305; *Silliman* v. *Nowlan*, 271 Ill. App. 484, 493.

We respectfully submit that the petitioner is not barred from recovering under his common counts the money paid by him to the respondent in reliance upon the alleged *ultra vires* contract.

CONCLUSION.

We have shown to this Court that it has jurisdiction to issue its writ of *certiorari* herein; that the repurchase agreement is not *ultra vires*, but that it is within the express powers of the respondent as granted by the National Banking Act; that at most the repurchase agreement can be deemed only to be an abuse of the express powers of the respondent, who is estopped to plead the defense by reason of the fact that it has received and retained the benefits of the transaction; and, finally, we respectfully submit that we have shown to the Court that even assuming the repurchase agreement to be *ultra vires*, the petitioner is nonetheless entitled to recover from the respondent the purchase price of the bonds purchased by him in reliance upon such alleged *ultra vires* contract. We, therefore, pray that this Honorable Court issue its writ of *certiorari* directed to the Appellate Court of Illinois, First District, for the purpose of reviewing the decision of said Appellate Court.

Respectfully submitted,

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EDWARD C. HIGGINS,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

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IN THE

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OCTOBER TERM, A. D. 1934.

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ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

To the Honorable Supreme Court of the United States

This cause is now before this Honorable Court on a writ of *certiorari* granted March 4, 1935 to review the judgment of the Appellate Court of Illinois, First District, reversing the judgment of the Circuit Court of Illinois entered in favor of the petitioner and against the respondent.

I.

Opinion of the Court Below.

The opinion of the Appellate Court of Illinois, First District, is reported in 275 Ill. App. 530 (see also Transcript of Record, p. 31).

II.

Jurisdiction of this Court.

The question of this Court's jurisdiction to review the decision of the Appellate Court of Illinois, First District, was presented and argued by both parties on petition for writ of *certiorari*. This Court decided in favor of its jurisdiction and granted the writ. The case is now before the Court for review on the merits and we, therefore, feel that the jurisdictional question is closed and no further argument need be made on that behalf. We, however, will restate the grounds of this Court's jurisdiction so that we strictly comply with the Court's rules.

The petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

First National Bank, etc., v. *Alexander Anderson*, 172 U. S. 573.

Leander J. McCormick v. *Market National Bank of Chicago*, 165 U. S. 538.

Logan County National Bank v. *Townsend*, 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that this Court has jurisdiction to review the decision of said Appellate Court of Illinois.

Chicago & Eastern Illinois R. R. Co. v. *Industrial Commission of Illinois*, 284 U. S. 296, 297.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102, 104.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410.

American Railway Express Co. v. *Levee*, 263 U. S. 19.

III.

Statement of the Case.

This cause came before the Appellate Court of Illinois on the pleadings, and in the interest of brevity we will summarize the pertinent facts appearing therein.

The action is in assumpsit and the declaration contains a count in special assumpsit upon a written contract. The following is alleged in substance: The payment by the petitioner of Thirty Five Thousand Dollars ($35,000) in consideration of the delivery by the respondent to the petitioner of thirty-five (35) One Thousand Dollar ($1,000) par value First National Company real estate bonds and a written agreement by the respondent to repurchase the same at maturity, paying therefor the par value of said bonds and accrued interest thereon, and further alleging the breach of said contract by the respondent. (Rec. p. 1)

The declaration also contained the common counts in general assumpsit. (Rec. p. 1)

The petitioner filed with his said declaration an affidavit of claim, pursuant to the Illinois Practice Act of 1907 (Cahill's Illinois Rev. St., 1931, chap. 110, paragraph 55). (See Appendix.) The affidavit stated, in substance, that the nature of his demand was upon said written contract to repurchase said bonds from him, as aforesaid. (Rec. p. 4)

To said declaration the respondent filed two pleas: (1) The general issue, and (2) a special plea alleging that said written contract was *ultra vires* the respondent under the National Bank Act. (Rec. p. 6)

With each of said pleas, the respondent filed two affidavits of defense, the one filed to the special plea alleging, in substance, that the respondent was a National Bank organized under the National Banking laws and that it had no authority, under said banking laws, to make this agreement. (Rec. p. 6)

The Circuit Court of Cook County, upon a directed verdict, entered a judgment in favor of said respondent, from which judgment the petitioner appealed to the Appellate Court of Illinois, First District. Said Appellate Court reversed said judgment and remanded said cause to the trial court. (Rec. p. 7) The decision of the Appellate Court of Illinois on said appeal is reported in 265 Ill. App. 238.

After said cause was redocketed in the Circuit Court of Cook County, that Court, on April 15, 1932, struck the respondent's affidavit of meritorious defense filed with its special plea, on the ground of its insufficiency in law, and entered a judgment, as upon default, in favor of the petitioner and against the respondent for the sum of Thirty Nine Thousand, Eight Hundred Forty One Dollars and Sixty Six Cents ($39,841.66), together with the petitioner's cost of suit. (Rec. p. 7) (Cahill's Illinois Rev. St., 1931, chap. 110, par. 55). (See Appendix.)

On December 28, 1933, the respondent sued out a writ of error in the Appellate Court of Illinois, First District, to review the said judgment of the Circuit Court of Cook County, and, thereafter, on, to wit, June 15, 1934, the said Appellate Court of Illinois, First District, reversed the said judgment of said Circuit Court of Cook County and, without remanding said cause to the trial court, entered its own judgment against the petitioner. (Rec. p. 25)

On June 26, 1934, the said Appellate Court of Illinois denied the motion of the petitioner for a certificate of importance and an appeal to the Supreme Court of Illinois.

On October 23, 1934, the Supreme Court of Illinois denied to the petitioner leave to appeal to the said Supreme Court of Illinois from the judgment of the Appellate Court of Illinois, First District (Rec. p. 53), and by virtue of subsection (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Illinois Rev. St., 1933, chap. 110, par. 203) (See Appendix), the said judgment of the Appellate Court of Illinois became final.

IV.

Specifications of Error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred in finding and holding that the respondent had no power or authority under the National Bank Act, as then in force (44 Stat. 1226), to make and enter into the repurchase agreement sued upon and set forth in the petitioner's declaration, and in finding and holding that by reason thereof said contract was *ultra vires* and void, and that no recovery could be had thereon.

2. The Appellate Court of Illinois erred in not finding and holding that the respondent had the power and authority under the National Bank Act as then in force (44 Stat. 1226) to make and enter into the repurchase agreement sued upon and set forth in the petitioner's declaration, and in not finding and holding that said contract was within the corporate power of said respondent, and that the petitioner could recover thereon.

3. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that the petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by him to said respondent in reliance upon said void contract and agreement.

4. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that the petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by him to said respondent in reliance upon said void contract and agreement.

V.

Summary of Argument.

A. The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty-five Thousand Dollars ($35,000), the Thirty-five Thousand Dollars ($35,000), First National Company collateral trust, Series "O," first mortgage real estate 5½% gold bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

(a) The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

(b) The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

B. The respondent, having received the benefits of the repurchase contract, is estopped to plead that such contract was ultra vires.

C. Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strength of said agreement.

VI.

Argument.

A. The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty-five Thousand Dollars ($35,000), the Thirty-five Thousand Dollars ($35,000) First National Company collateral trust, Series "O," first mortgage real estate 5½% gold bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

(a) The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

The National Bank Act of 1922, as amended by the Act of February 25, 1927, c. 191, sec. 2; 44 Stat. 1226, which was in force at the time when the respondent sold the First National Company bonds to the petitioner, provided as follows:

> "* * * The association shall become * * * a body corporate, * * * and it shall have the power—
>
> "*Third.* To make contracts. * * *
>
> "*Seventh.* To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; * * * Provided, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations, evidencing indebtedness of any person, co-

partnership, association or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities * * *."

Under the authority of this statute, the respondent Bank was empowered to buy and sell without recourse the bonds in question and enter into contracts. The respondent had statutory power for every element involved in the instant transaction.

(b) The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

The words "without recourse" have a definite legal significance when applied to bonds, notes or debentures which the National Banking Act permitted the respondent to buy and sell. They mean: Without liability on the obligation of the third party upon his failure to perform.

It was said in *Thompson* v. *First State Bank*, 102 Ga. 696:

> "The words 'sans recourse' ('without recourse'), * * * have no exact legal significance, except when they are employed by an endorser to limit his liability upon a negotiable instrument * * *. An instrument followed by this phrase relieves the endorser of liability *for the payment of such paper in the event it is dishonored by the maker or acceptor.*" (Italics our own.)

To the same effect are the following cases: *Kaill* v. *Bell*, 88 Kas. 666; *Youngberg* v. *Nelson*, 51 Minn. 172; *Reynolds Mortgage Co.* v. *Garrett*, 23 S. W. (2d) 835 (Tex. Civ. App. 1929); *Cameron* v. *Ham*, 23 Ohio App. 359; *Arthur* v. *Rosier*, 217 Mo. App. 382.

With this definition before us, let us examine the written contract of November 1, 1929, to see if it obligates the respondent to pay the First National Company bonds if the maker thereof fails to do so. For the convenience of the Court we will set forth the contract, which reads as follows:

"Atlas Exchange National Bank
of Chicago
Capital and Surplus $240,000
Chicago, Ill.

Nov. 1, 1929.

Mr. Leo Awotin,
1920 S. Halsted St.
Chicago, Ill.

Dear Sir:

This is to acknowledge that we have this day sold you thirty-five thousand ($35,000) Dollars, par value First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5½% Gold Bonds, in denominations of $1,000 each, numbered as follows: Nos. 4584-4585 and 4612 to 4644 inclusive.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000 and accrued interest.

Yours very truly,

B. M. Blankenheim,
Cashier."

There is not one word in the respondent's agreement which hints at a guaranty or which provides recourse

against the respondent. By this agreement, the respondent does not become liable for the payment of the bonds in the event that they are dishonored by the First National Company, the maker thereof. The respondent's obligation to repurchase the bonds is in no wise conditioned upon the failure of the First National Company to pay them at their maturity. From the plain and unambiguous language of the contract, the respondent's obligation thereunder is solely to *repurchase* the bonds upon the demand of the petitioner, independently of the performance or non-performance or default by the First National Company of its obligation to pay said bonds at their maturity. The essential element of the guaranty or of recourse is, therefore, lacking, and there is no justification for reading that element into the contract. In fact, it is impossible by the longest stretch of imagination to read into these simple words any promise by the respondent to pay the bonds upon default by the maker, the First National Company.

Viewed from another aspect, we respectfully submit to the Court that the respondent's agreement cannot be construed as affording recourse against it.

The respondent must be regarded as having been the owner of the bonds which it sold to the petitioner. They constituted a part of its assets. Selling property is an act of ownership, unless the contrary is shown. *Farmers and Merchants State Bank* v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308. There is no such showing in the record of this case.

Being the owner of the bonds, the respondent sold them upon the condition that if the petitioner desired to do so, he could return them and receive back from the respondent the purchase price which it received and retained as part of its assets. In short, the sale was subject to defeasance

upon a condition subsequent, *i. e.*, the exercise by the petitioner of his right to resell said bonds to the respondent.

Wolf v. *National Bank of Illinois*, 178 Ill. 85.
Ubben v. *Binnian*, 182 Ill. 508.
Kantzeler v. *Bensinger*, 214 Ill. 589.
Stewart v. *Dobson*, 282 Ill. 192.
Freedman v. *Madison & Kedzie State Bank*, 258 Ill. App. 519 (*certiorari* denied, 259 Ill. App. XIV.)

Viewed thusly, it cannot be said that the agreement in question was a guaranty of the bonds or afforded recourse against the respondent. It merely permitted the petitioner to be placed in *statu quo*, if he so desired, by exercising his right to resell the bonds to the respondent, and if the parties should be thus restored to their former positions, the respondent would again become the owner of the bonds which it formerly owned and the petitioner would have his money back. As long as the respondent had the authority to buy the bonds in the first instance, it must have the authority to buy them from the petitioner. Especially must this be true, when the respondent's agreement was an inducement to the petitioner to pay Thirty Five Thousand Dollars ($35,000) for the bonds.

The Appellate Court of Illinois relied upon the recent decision of the Supreme Court of Illinois in the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, when it held void the repurchase contract declared on in this case and also when it held that the transaction between the petitioner and the respondent was not a conditional sale. We respectfully submit to this Honorable Court that the *Knass* case is not an authority for the case at bar; it cannot be deemed analogous to the case before this Court, and that it did not overrule the cases last cited by us in support of

our contention that the repurchase contract made the transaction a conditional sale.

There are two important facts in the *Knass* case which we desire to point out to the Court: (1) The Illinois Court was there considering the powers of the banks organized under the Illinois Banking Act (Cahill's Ill. Rev. St., 1933, chap. 16a, sec. 1); (2) The bank, when it sold the bonds covered by a repurchase agreement, was acting not as a principal, but as a broker, as it appears from the language of the Illinois Supreme Court, when it said on pages 568 and 569: "The fact that the bank may have received a commission for selling them in no wise renders the mortgage bonds obligations of the Bank" and "it will be presumed that the mortgagor, * * * received the amount paid by the claimants (complainants in the case) less commissions charged for the sale."

The Illinois Banking Act (Cahill's Ill. Rev. St., 1933, chap. 16a, sec. 1) reads as follows:

> "It shall be lawful to form banks and banking associations, as hereinafter provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks or banking associations shall have the power to loan money on personal and real estate security and to accept and execute trusts, and shall be subject to all of the provisions of this Act."

Under this statute, the bank in the *Knass* case was not authorized to buy bonds nor was it authorized to act as an agent or broker in the purchase or sale of bonds. Clearly, then, the repurchase agreement in the *Knass* case was *ultra vires* under the Illinois Statute, *because the bank had no*

authority to enter into a contract for the purchase of bonds and not because such a contract might constitute a guaranty of the bonds. Even if the Court had not considered the contract as a guaranty, the bank did not have the power to buy the bonds.

The Supreme Court of Illinois chose to pass over the fact that the bank had no authority to buy bonds and decided the *Knass* case on the theory that the sale with the repurchase agreement constituted a guaranty of the bonds and not a conditional sale thereof.

Under the facts in the *Knass* case, the sale could not have been conditional so as to obligate the *bank* to repurchase the bonds because it was acting as a broker in the transaction. The sale was not for its own use and benefit. The bank did not retain the purchase price, but delivered it to the maker of the bonds less its broker's commission which amount it retained. If the sale were to be conditional, the maker of the bonds, who had received the purchase price therefor, would have had to take the bonds back and refund the money received. If the bank had been forced to perform the contract, it would have been making an original sale, and we have seen that under the Illinois Banking Act, it was not authorized so to do.

Clearly, under the facts in the *Knass* case, as we have outlined them, the Illinois Supreme Court did not overrule those cases which support our contention that the transaction involved in the case at bar was a conditional sale. In our case, the bank received the purchase price for its own use and benefit and had it performed the obligations of its contract and repurchased the bonds, it would have been returned to the same position in which it stood prior to the sale—owning the same bonds. In the *Knass* case, however, a performance of the contract by the bank would

not have resulted in returning the parties to a *status quo*, but, as we have seen, it would have forced the bank to buy bonds which, under the Illinois Banking Act, it had no authority to do.

In the case at bar, the petitioner's right to resell and the respondent's obligation to repurchase the bonds, were not conditioned upon any default in the payment thereof by the First National Company.

We respectfully submit that upon the authority of the cases which we have cited and upon a logical analysis of the facts of the case at bar, the transaction was a conditional sale and as such was not a sale without recourse.

The Supreme Court of Illinois in its decision in the *Knass* case discussed what it deemed to be dangers to which the financial structure of the bank and its depositors and the public at large would be subjected if the bank were permitted to enter into repurchase agreements creating contingent liabilities against which it would be powerless to protect itself. While those dangers may have existed under the facts of that case, that danger is, however, not present in the case at bar, because, as we have already pointed out to the Court, *when the contingent liability was created, the bank received for its own use and benefit assets sufficient to offset such liability and, therefore, the bank could have set up a reserve against the maturity of such liability.*

In the myriad of other authorized transactions in which a national bank engages, it incurs liabilities, many of which are contingent, and against which it protects itself. Merely because it incurs a liability, absolute or contingent, is no reason for denying to the bank power to engage in such transactions, so long as such a power is expressly granted by the statute.

We respectfully submit that the repurchase contract involved herein did not make the sale of the First National Company bonds to the petitioner a sale with recourse; that the sale was a conditional sale and as such it was within the expressly granted powers of the respondent.

B. The respondent, having received the benefits of the repurchase contract, is estopped to plead that such contract was ultra vires.

If we assume for the purpose of this argument that the contract in question made the sale of the First National Company Bonds to the petitioner a sale with recourse, and constituted a guaranty of the bonds, the respondent could not avail itself of the defense of *ultra vires.*

The statute gives to the respondent the authority to buy and sell investment securities without recourse. To sell them with recourse would be only *an abuse of granted power* and the respondent, having received the benefits of a contract made only in excess or in abuse of its *granted powers,* is estopped to plead the defense of *ultra vires.*

Gibson v. *Kansas City Refining Co.*, 32 F. (2d) 658.

Standard Furniture Co. v. *Smith*, 32 F. (2d) 176.

Grand Valley, etc. v. *Zummbrunn*, 272 Fed. 943.

This rule must be distinguished from that principle, laid down by this Court, to the effect that a corporation cannot be estopped from pleading the defense of *ultra vires* to an act which it had *no* authority under its charter to do. In this case the respondent had the authority and power to sell the bonds so that at the most it *abused* that *granted* power by selling the bonds with recourse.

C. Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strength of said agreement.

We have already pointed out to the Court that the respondent must be regarded as having been the owner of the bonds which it sold, they had been a part of the bank's assets, so that when it received Thirty Five Thousand Dollars ($35,000) from the petitioner, the purchase price thereof, that money was received for its own use and was retained by it and took the place of the bonds among the bank's assets. The respondent received the benefit from the contract.

The respondent, after receiving the benefit of its alleged *ultra vires* contract, repudiated it when called upon to perform. The respondent made no offer to return the benefits thus received, and it is a well-settled rule of law often decided by this Court, that a corporation which has repudiated a contract as being *ultra vires*, will not be permitted to retain the benefits it has received under such a void agreement, and is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc. Co.*, 139 U. S. 24, 60.

Logan County National Bank v. *Townsend*, 139 U. S. 67.

Pullman Car Company v. *Central Transportation Co.*, 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank*, 176 U. S. 618.

Citizens' Central National Bank v. *Appleton*, 216 U. S. 196.

The case of *Citizens' Central National Bank* v. *Appleton, supra,* 216 U. S. 196, is one wherein a National Bank, to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the re-payment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the National Banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be more impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra,* 216 U. S. 196, is important.

This doctrine is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract (*Texas and Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245); it is predicated upon the theory that the corporation, having received money or property under a void agreement, is not, in equity and good conscience, entitled to retain the money or property and at the same time repudiate the contract.

The Appellate Court of Illinois in its decision of the case at bar held that the petitioner had no right to recover upon an implied assumpsit, the moneys paid for the purchase of the bonds on the strength of the repurchase agreement; the court based its decision on two grounds: First, that under this Court's decision in the case of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, no rights arise out of an *ultra vires* contract, so no recovery could be had, and second, because the affidavit of claim filed by the petitioner in support of his declaration disclosed that the cause of action was predicated upon the written contract which, the Appellate Court held, was void.

In attempting to recover upon the implied assumpsit we do not seek to recover on the contract and there is nothing in the facts or in what this Court said in the *Pottorff* case, that is in conflict, either directly or indirectly, with the cases cited by us in support of our right to recover upon the implied assumpsit theory. In that case, this Court merely said that a National Bank could not be estopped from defending an action on a contract on the ground that it was *ultra vires*, and that *even if the doctrine of the recovery of the benefits obtained by means of an ultra vires contract were applicable* (to the facts in the *Pottorff* case), the complainant therein would not be en-

titled to recover the full amount of its depost in the defunct bank, because,

> "*the argument if applicable would not help the Railway.* Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded." (Italics our own.)

We respectfully submit that the *Pottorff* case in no wise overrules the cases last cited by us in support of this branch of our argument. This Court still recognizes the salutary doctrine of the right to recover, upon an implied promise, any benefits received by virtue of an *ultra vires* contract.

The second proposition upon which the Appellate Court grounded its denial of any recovery upon the implied assumpsit theory is, we believe, equally without force.

As we have already stated to the Court, the petitioner declared against the respondent in special assumpsit and also in general assumpsit, filing a special and the common counts. The affidavit of claim which the petitioner filed pursuant to the Illinois Practice Act of 1907 (Cahill's Ill. Rev. St., 1931, par. 55) (See Appendix) stated that his demand was upon the written contract.

It is an elementary rule of pleading that allegations in the *declaration* control the right of recovery. It is likewise elementary that each count is a declaration in and of itself, and that even though two or more counts may be

joined in a single action, each count remains a declaration. It is important to note that the purpose of a joinder of counts in special and general assumpsit is to permit a plaintiff to recover any money to which he may be entitled under the evidence if it develops that for some reason he cannot recover on the express contract. In short, when the common counts are joined to a special count, they act as a catchall in order to permit a recovery if the plaintiff proves any cause of action in assumpsit. 5 Corpus Juris 1399.

It is true that in the case before the Court, the affidavit of claim states that the petitioner's demand is upon a written contract, but this affidavit applied only to the petitioner's demand under the special count. In other words, the affidavit was filed to the special count alone, and there was no affidavit filed to the common counts. To hold otherwise, would be to render nugatory the very purpose of joining common and special counts. It would permit pleadings to be controlled by affidavits to an extent not contemplated by the statute (Cahill's Ill. Rev. St., 1931, chap. 110, sec. 55) (See Appendix) when we consider that its purpose is to aid plaintiffs and relieve them from the delay occasioned by defendant's pleading sham defenses. *Harrison* v. *Rosehill Cemetery Company*, 291 Ill. 416, at 419, 420; *Haggard* v. *Smith*, 71 Ill. 226; *Cooper* v. *Anderson*, 236 Ill. App. 1, 5; *Reddig* v. *Looney*, 208 Ill. App. 413, 416.

The purpose of the statute being as we have stated, the affidavit of plaintiff's claim is construed as being evidenciary in character, that is, it supplies the evidence upon which the Court may enter a judgment if a defendant fails to appear or to plead, or if he pleads, then if he fails to file an affidavit of meritorious defense. *Keator, etc. Co.* v. *Thompson*, 144 U. S. 436; *Kern* v. *Strasberger*, 71 Ill. 303, 305; *Silliman* v. *Nowlan*, 271 Ill. App. 484, 493.

When this case was before the Appellate Court on the first appeal (*Awotin* v. *Atlas Exchange National Bank of Chicago*, 265 Ill. App. 238), the respondent argued that since the petitioner's affidavit of claim alleged that his demand was upon the written contract, he could have no recovery upon the implied assumpsit. To this argument, the Appellate Court said, on page 248 of its opinion:

> "But defendant's counsel contends that there can be no recovery by plaintiff in this case. Under an *implied* promise or agreement, '*where the verified statement of claim* alleges an *express* promise.' Counsel refers to that portion of plaintiff's 'affidavit of amount due,' as above set forth, wherein plaintiff states that his demand is 'for $37,085.41 • • • *under its written agreement, dated Nov. 1, 1929,*' etc. In support of his contention counsel cites certain Appellate Court decisions. But we think that plaintiff's declaration, in which are included the common counts, is sufficient to warrant a recovery under an implied promise • • •. If counsel's contention be a good one, in those cases where an affidavit of claim has been filed by a plaintiff with his declaration and an affidavit of merits by a defendant with his plea, the result would be that such cases would be tried, as said in *Cox* v. *Aetna Cas. & Surety Co.*, 261 Ill. App. 394, 399, 'upon the issues made by the affidavits instead of by the pleadings.' In our opinion there is no merit in counsel's contention."

When the Appellate Court had the case before it on the second appeal, it completely reversed its stand on this proposition, saying:

> "Plaintiff's counsel also contends that 'even if it be considered that the bank in making the repurchase agreement acted *ultra vires*, plaintiff, having tendered

the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit.*' It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *assumpsit* after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Pottorff* case, *supra,* it is the settled doctrine of the Supreme Court of the United States that 'no rights arise on an *ultra vires* contract even though the contract has been performed.' This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra,* (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* 'without tendering to plaintiff the money defendant received from plaintiff' is equally without merit.''

It seems quite apparent that if the Appellate Court had believed that the substantive law permitted the petitioner to recover on the implied assumpsit, it would not have reversed its former ruling on the procedural question. The Court, however, relying upon the case of *Texas & Pacific Railway Co.* v. *Pottorff, supra,* 291 U. S. 245, held that as a matter of substantive law the petitioner could not recover upon the implied promise and, consequently, its ruling on the procedural question was merely gratuitous. We have heretofore pointed out to this Court that nothing in its opinion in the *Pottorff* case could be deemed to prevent a recovery upon the implied contract theory.

The cases in which the Illinois Courts have said that the affidavit of claim and the affidavit of merits limits the issues indicate that the language means that the parties

are limited to introducing evidence only on the facts alleged in their respective affidavits. *Keim* v. *Thum*, 238 Ill. App. 579; *Goddard Tool Co.* v. *Crown, etc., Co.*, 219 Ill. App. 34; *Cooper* v. *Anderson*, 264 Ill. App. 1; *Reddig* v. *Looney*, 208 Ill. App. 413.

We respectfully submit that the petitioner is entitled to recover in general assumpsit the moneys which he paid for the First National Company bonds in reliance upon the contract which the respondent has repudiated on the ground that it is *ultra vires.*

CONCLUSION.

We respectfully submit to this Honorable Court that the repurchase contract declared on in this case is not *ultra vires;* that it is within the express powers of the respondent as granted by the National Bank Act; that at the most the repurchase agreement can be deemed only to be an abuse of the express powers of the respondent who is estopped to plead the defense by reason of the fact that it has received and retains the benefits of the transaction; and, finally, we respectfully submit that we have shown to the Court that even assuming the repurchase agreement to be *ultra vires,* the petitioner is entitled to recover from the respondent in general assumpsit the purchase price of the bonds paid by him in reliance upon the alleged repurchase contract. We, therefore, pray that this Honorable Court reverse the judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,

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APPENDIX.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII (Cahill's Ill. Rev. St., 1933, Chap. 110, Par. 203):

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however*, that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen

hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

Illinois Practice Act of 1907, section 55 (Cahill's Illinois Revised Statutes, 1931, Chap. 110, Sec. 55):

"Affidavit of plaintiff's claim—Default—Defendant's affidavit of merits.) Sec. 55. If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an

affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion specifying the amount (according to the best of his judgment and belief), upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order; no affidavit of merits need be filed with a demurrer or motion: *Provided,* that this section shall not apply to any case where an executor or administrator shall defend in behalf of any estate: *And, provided, further,* that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court but expects to produce by the next term, the court shall continue such cause until the next term. If the affidavit of defense is to only a portion of the plaintiff's demand the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor; but in such case the court may make such order as to the costs of the suit as may be equitable."

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CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

DANIEL M. HEALY,
Attorney for Respondent.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

I.

JURISDICTION OF THIS COURT.

A.

For this Court to assume jurisdiction it must affirmatively appear from the record that the Federal question was presented to and necessarily decided by the Supreme Court of Illinois.

Petitioner has not seen fit to include in the record presented to this Court any of the pleading and proceeding

before the Supreme Court of Illinois other than the copy of the order denying him leave to appeal. It is conceivable that his petition for leave to appeal may have raised only questions of State law and procedure which did not involve a federal question and that the Court's refusal to entertain the appeal was not a refusal to consider and determine such federal question.

This Court in the recent case of *Lynch* v. *New York ex rel. Pierson*, 79 Law Ed. Adv. Op. 1, says at page 2:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

B.

The exercise of the discretion of the State Supreme Court as to whether it should review the judgment of the Appellate Court was never properly invoked by petitioner.

There appears in the record no showing that any proper application was made to the Supreme Court of Illinois, the highest court of the State, to review the decision of the Appellate Court, which it is here sought to review.

Petitioner in making his application to the Supreme Court of Illinois admittedly followed the procedure provided by the Civil Practice Act of that State. This Civil Practice Act enacted in Illinois June 23, 1933, and in force January 1, 1934 (Cahill's Illinois Revised Statutes 1933, Chapter 110), did not apply to judgments rendered by the trial court prior to January 1, 1934. The judgment in ques-

tion was entered by the Circuit Court of Cook County, Illinois, April 15, 1932.

By Section 1 of Article 1 of said Civil Practice Act it is provided that the Supreme Court of the State shall have power to make rules of pleading, practice and procedure for the city, County, Circuit, Superior, Appellate and Supreme Courts supplementary to but not inconsistent with the Act. By Section 3 of said Article 1 it is provided that the Schedule of Rules set forth in Article IX of the Act shall be subject to suspension and amendment by the Supreme Court. On December 22, 1933, the Supreme Court, pursuant to the provisions of the Civil Practice Act, adopted Rules of Practice and Procedure which appear in Volume 355 of the Illinois Supreme Court Reports, and the first rule thereof deals with the applicability of the Civil Practice Act. This Rule No. 1 is as follows:

"APPLICABILITY OF CIVIL PRACTICE ACT.

Rule 1. All provisions of the Civil Practice Act with respect to review in civil proceedings by the Supreme or Appellate Courts shall apply to orders, determinations, decisions, judgments or decrees entered by trial courts on or after January 1, 1934. All suits in which a summons has been issued prior to January 1, 1934, but in which no pleadings have been filed by either party prior thereto, shall be governed by the Civil Practice Act. The provisions of the Civil Practice Act with respect to service of process issued on or after January 1, 1934 (sections 6, 10, 13-19), appearance (section 20) and trial practice (sections 48-73) shall apply to proceedings instituted prior to January 1, 1934, and not on trial prior to that day. Except as provided by this rule, or by written stipulation of parties, or by order of the court, upon notice and motion, proceedings instituted prior to January 1, 1934, shall not be governed by the Civil Practice Act."

Rule No. 71 provides that:

"These rules shall be in effect January 1, 1934, and

be in lieu of all rules in the schedule to the Civil Practice Act, and of all other rules of this Court heretofore in force."

It thus appears that the procedure adopted by petitioner in following the Civil Practice Act and asking *"leave to appeal"* to the Illinois Supreme Court was not the proper practice as provided by law and the Supreme Court's denial of *"leave to appeal"* was not necessarily a refusal to review the judgment of the Appellate Court, or an indication that it would not so review it if its jurisdiction had been properly invoked.

Prior to January 1, 1934, the method of reviewing decisions of the Appellate Courts by the Supreme Court was controlled by the Practice Act of 1907. (Cahill's Illinois Revised Statutes, 1933, Appendix LVI.) This Act was repealed by Section 94 of the Civil Practice Act with the provision, however, that "nothing in this provision for repeal shall impair or affect any action or proceeding commenced before this Act shall have taken effect." (Chapter 110, Section 94, Cahill's Illinois Revised Statutes, 1933.)

Under the Practice Act of 1907 (Chapter 110, Section 120, Cahill's Illinois Revised Statutes, 1933, Appendix LXXVI), it is provided that the method of securing a review by the Supreme Court of a judgment of the Appellate Court shall be by the Supreme Court granting on application a writ of certiorari requiring the Appellate Court to certify the case to the Supreme Court for its review and determination.

No request was made by petitioner to the State Supreme Court that it grant its writ of certiorari in this case, and in the absence of such a request it cannot be contended that the exercise by the State Supreme Court of the discretion placed in it by the State laws has been invoked.

In the proceedings before the State Supreme Court this respondent called to the Court's attention, by its answer to petitioner's application for leave to appeal, the fact that there was no authority or legal basis for the procedure adopted by petitioner. It cannot therefore be presumed that the court's action was not prompted wholly by this fact and that if its discretionary power had been properly invoked it would not have granted the writ of certiorari, assumed jurisdiction, and determined the questions involved upon their merits.

For this court to assume jurisdiction it must affirmatively appear from the record that a decision could not be had in the highest State Court upon the federal question involved. *Mullen* v. *Western Springs Beef Co.*, 123 U. S. 116.

It is well settled by the decisions of this Court that it will review the final decision of the highest court of a state only when the Federal right claimed has been asserted in a manner calling for a decision by such highest court under its established system of practice and pleading.

Atlantic Coast Line Railroad Company v. *Mims*, 242 U. S. 532.

Hartford Life Ins. Co. v. *Johnson*, 249 U. S. 490.

In *Newman* v. *Gates*, 204 U. S. 89, a judgment was entered in the State trial Court against three persons. After judgment one of the judgment debtors died and the survivors appealed to the Appellate Court of the State without making the personal representative of the decedent a party thereto. The Appellate Court affirmed the judgment but the State Supreme Court on removal of the cause to that Court held that the appeal was defective because of failure to make the personal representative of the decedent a co-appellant, and dismissed the appeal without a determination upon the merits.

Upon a motion made in this Court to dismiss the writ of error under which the cause was brought here, this Court at page 95 said:

> "The removal of the cause from the Appellate Court into the Supreme Court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. *Oster* v. *Broe*, 161 Ind. 114, 64 N. E. 918. Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such questions, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.
>
> Writ of error dismissed."

C.

There is in the case at bar no substantial Federal question.

Petitioner cites on page 8 of his petition three cases involving national banks where the decisions of State Courts were reviewed by this Court, and urges that these cases are indicative that questions involving the powers and obligations of national banks under their charters are federal questions entitling the parties thereto to a review

in this Court. These cases were brought to this Court by writs of error at a time when the issuance of such writs was a matter of right. Since the amendment to the Judicial Code in 1916 such questions are now reviewable only when this Court has in the exercise of its discretion determined that they are substantial and of sufficient importance to warrant the review. We do not believe that there is here any such substantial federal question.

In this case the petitioner purchased and received from the respondent bank certain mortgage bonds for which he paid cash. In connection with this purchase the cashier of the bank gave to petitioner a written repurchase agreement dated November 1, 1929 (Rec., 3) in which, after acknowledging the sale of the bonds and the price received therefor, he stated as follows:

> "Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000.00 and accrued interest."

The only federal question involved in this case is whether this repurchase agreement is *ultra vires* as being in violation of the express provision of Section 5136 of the National Bank Act as amended in 1927, wherein after enumerating the powers granted to national banks, it is provided:

> "That the business of buying and selling investment securities shall hereafter be limited to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association or corporation, in the form of bonds, notes and/or debentures commonly known as investment securities."

The question as to whether the repurchase agreement was in violation of the foregoing provision is not a substantial one and does not necessitate extended consideration for its determination. The meaning of the words

"without recourse" is clearly apparent. As is said in *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, 699:

> "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

Petitioner by his affidavit of claim (Rec., 4) confined his cause of action and limited his recovery to the said written *ultra vires* agreement. In this affidavit made pursuant to Section 55 of Chapter 110 of the Illinois Practice Act of 1907 (Cahill's Illinois Revised Statutes, 1933, Appendix LXV), it is stated that plaintiff's claim was for money—

> "due and owing from the defendant to the plaintiff under its written agreement dated November 1, 1929."

It would seem, therefore, that the mere statement of the admitted facts would necessarily force the conclusion that petitioner's claim based as it is solely upon an *ultra vires* contract is of insufficient merit to invoke the jurisdiction of this Court.

D.

The decision of the State Court is in accord with the applicable decisions of this Court.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245, is an applicable decision by this Court of issues similar to those involved in the pending case. That case involved the validity of a pledge of assets of a national bank to secure a private deposit. This court there held that national banks lack the power to make such a pledge because it is not conferred by Congress; that no estoppel

arose out of the obtaining of such a deposit by the pledge of assets, and that such *ultra vires* contract even though fully performed gave rise to no rights thereon and did not estop the bank from challenging the legality of the power exercised.

In *Cassatt, et al.*, v. *First National Bank of West New York*, 291 U. S. 660, this Court on January 15, 1934, denied a writ of certiorari to review the decision by the New Jersey Court of Errors and Appeals reported in 168 Atl. 585. That case involved the right of a national bank to purchase stock in another corporation and in that connection the New Jersey Court considered the 1927 Amendment to the National Bank Act. That court held against the power claimed and in is discussion of the issues gave attention to questions similar to the ones here involved. It held that it was a contradiction of terms to say that a national bank which has no power whatever under the law to purchase speculative securities directly, may, nevertheless, make itself liable as a purchaser by acting as an agent for a customer of the bank as such conclusion would nullify the purpose of the statutory limitation of its powers, which is to conserve the rights of its depositors and stockholders and enable it to perform unimpaired its functions as an agency of the federal government. It further held that persons dealing with national banks are charged with notice of the limitation of their powers.

In *Knass* v. *Madison and Kedzie State Bank*, 291 U. S. 660, this Court dismissed for want of a substantial federal question an appeal from the decision of the Supreme Court of Illinois reported in 354 Ill. 554, which decision together with the decision in *Texas, etc.*, v. *Pottorff*, 291 U. S. 245, were quoted by the Appellate Court of Illinois as sustaining its decision which it here seeks to review. The issues in the *Knass* case were almost identical with those in the case at bar.

The foregoing cases, all of very recent date, indicate clearly that the decision of the state court in the case at bar is in accord with the attitude of this Court.

II.

ULTRA VIRES.

The repurchase agreement was clearly ultra vires and in direct violation of the National Bank Act.

Respondent, a National Bank, had only the powers conferred upon it by the "National Bank Act" (5136 of the Revised Statutes). The powers conferred upon National Banks by Section 7 of this Act, so far as applicable here, are as follows:

> "*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title: *Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities.*"

The portion in italics was first added by the Act of Congress of February 25, 1927, amending said section.

It will be observed that the grant of powers to national banks by the above Act before its amendment was substantially the same as the grant of powers by the Banking Act of Illinois approved June 23, 1919, which was the subject

of construction by the Supreme Court of Illinois in the case of *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554.

It was there held by the Court that the term "general banking business" includes only such powers as are ordinarily conferred upon and used by banks such as loaning money, discounting notes, receiving deposits and dealing in commercial paper; and further that a repurchase agreement similar to the one involved in this case is not within the scope of a general banking business and is not within any of the powers conferred by the said State Banking Act, but is against public policy as it jeopardizes and impairs deposits and results in injury to depositors and the public.

The position taken by the Court in the *Knass* case has been reaffirmed in the recent case of *Hoffman* v. *Sears Community Bank*, 356 Ill. 598, where the Court stated that it adhered to the legal conclusions reached therein.

It follows that even without the amendment of 1927 the National Banking Act did not confer upon the national bank the power to enter into the repurchase agreement.

This interpretation was given to the National Bank Act by the Supreme Court of Minnesota in the case of *Greene* v. *First National Bank*, 172 Minn. 310, which was decided prior to the said amendment. In that case the Court said:

> "But a guaranty of commercial paper sold by a bank and a contract to repurchase real estate mortgages which the bank has sold stand on a different footing. As was said in *Eberlein* v. *Stockyards Mortg. & T. Co., supra*, to agree to repurchase on demand, and at face value securities the bank sells subjects it to a contingent liability, the sudden maturing of which, by the concurring demands of a large number of purchasers, may easily absorb its capital instantaneously. Paraphrasing the language of *Farmers' & M. Sav. Bank* v. *Crookston State Bank, supra*, it may be said that every bank is charged with duties to the public.

A bank is more than a mere private corporation for pecuniary profit. A national bank is under the supervision of the federal authorities. A contract to repurchase real estate mortgages which the bank has sold is in defiance of safe banking, tends to injure the depositors of the bank, and is contrary to public policy.

The power to contract for the repurchase of a loan secured by a real estate mortgage is not expressly conferred by the National Banking Act. Neither is it incidental to those expressly conferred. *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 371, 42 L. ed. 198, 202, 17 Sup. Ct. Rep. 831, is a case dealing with the acquisition by a national bank of stock in another corporation. It was held that such banks do not possess the power to deal in stocks, and that an implied prohibition against such dealings resulted from the failure of Congress to grant the power. That doctrine is applicable here. National banks are not expressly authorized to make such contracts as defendant is alleged to have made. The failure to grant the power negatives its existence, for the power is of such a nature that it is not to be inferred in the absence of language clearly indicating its existence."

In *Weckler* v. *First National Bank*, 42 Md. 585, which was a case where the plaintiff, Weckler, brought suit against the First National Bank to recover the sum of one thousand dollars paid to the bank for bonds of the Northern Pacific R. R. Company, alleging that the sale was procured by false, fraudulent and deceitful representations made by the bank's teller, the trial court instructed the jury that as the defendant was organized under the National Banking Act, the purchase and sale of bonds was not within its chartered powers and the plaintiff could not recover. The court of appeals after reviewing the powers of National Banks under the National Banking Act says, on page 595:

"We are, therefore, clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and

being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. 8 G. & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the Court's instruction to the jury nor in the rejection of the appellant's first and second prayers."

To the same effect are the following:

Hotchkin v. *Third National Bank of Syracuse*, 219 Mass. 234.

First National Bank of Allentown v. *Hoch* 89 Pa. State 324.

The amendment to the National Bank Act made in 1927 placed an express prohibition upon transactions such as are here involved. It specifically limits the purchase and sale of investment securities to *"buying and selling without recourse marketable obligations."*

It would seem that the foregoing provision sets forth plainly the limitations of a national bank in buying and selling bonds and other securities. "'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss or damage, or failure of consideration in that which was the cause, the motive, the object of the undertaking or contract." *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, 699, 27 So. 110.

The provision of the National Bank Act above set forth is at least as comprehensive and far-reaching as the Illinois Statute on which the recent opinion of the Illinois Supreme Court in *Knass* v. *Madison & Kedzie State Bank* was based.

The limitation contained in this amendment to the National Bank Act prohibits such a transaction as is here involved even if it be construed to be a conditional sale as such a sale would not be "without recourse."

But the decision in the "Knass" case should be conclusive that the repurchase agreement here was not a conditional sale. Here as in the "Knass" case the bank, by the terms of the written agreement, agreed to repurchase the bonds sold at a specified price. The agreement recites the payment of the purchase price in full by the purchaser, who is under no obligation to return the bonds or the interest received but may dispose of them as he sees fit. Title passed to the purchaser without any condition remaining to be discharged. Under these circumstances the Court held that the transaction was not a conditional sale.

It was the apparent intention of Congress in making the said amendment to the National Bank Act to prevent by an all inclusive provision the possibility of national banks incurring a contingent liability with reference to investment securities which they purchased or sold. The wisdom of this legislation cannot be doubted in the light of the recent rapid change in the value of securities, which has demonstrated that such contingent liabilities if extensively incurred would be disastrous to any bank. Against this contingent liability the bank is powerless to take necessary steps for its protection. The maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government. It may also cause a great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

In the face of this enactment by Congress, little weight should be given to the argument of counsel for petitioner that the said provision does not mean what it so clearly states in simple and easily understood language, or that notwithstanding such provisions the right to incur this con-

tingent liability is necessarily incident to the right to sell, and that while specifically prohibited, it is implicitly permitted by the National Bank Act.

Of the Illinois cases cited by petitioner at the bottom of page 14 and the top of page 15 of his brief, the first and last cases are the only ones involving questions of corporate power and have both been overruled by the *Knass* case, 354 Ill. 554. An application for the review of the *Knass* case by the United States Supreme Court was refused.

It is suggested by attorney for petitioner that there is a distinction between the *Knass* case and the case at bar in that the bank in the *Knass* case acted only as a broker and received as its profit from the transaction, the commission agreed upon for the sale of the securities. We do not understand these to be the facts. The Supreme Court of Illinois did point out in its opinion that the bonds were the obligations of the corporations that owned the real estate and signed the bonds and in that sense were NOT THE BONDS OF THE BANK. There is also reference made to the fact that the bank MAY have received a commission for them although there is nothing in the record to show that fact. However, the method pursued by banks in underwriting real estate loans is a matter of common knowledge, and the fact that the bank's service or profit for loaning its own money and selling the bonds is commonly referred to as a commission does not render any the less true the fact that the bonds were the property of the bank. Nor does it make any difference in the principle involved whether the bank underwrote a bond issue or purchased the bonds on the open market. The loss to the bank would be the same if it was forced to repurchase when the market value was as a result of economic conditions greatly below the stipulated repurchase price.

III.

ESTOPPEL.

A contract of a corporation which is ultra vires in the sense that it is beyond the powers conferred upon it by the legislature is not voidable only, but wholly void and of no legal effect and the corporation is not estopped from urging this defense.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245.

Central Transportation Co. v. *Pullman Car Co.*, 139 U. S. 24-59.

California National Bank v. *Kennedy*, 167 U. S. 362.

First National Bank v. *Converse*, 200 U. S. 425-439.

Merchants National Bank v. *Wehrman*, 202 U. S. 295.

De La Vergne Refrigerating M. Co. v. *German Savings Institution*, 175 U. S. 40-58.

First National Bank v. *Hawkins*, 174 U. S. 364-369.

National Home Building and Loan Assn. v. *The Home Savings Bank, et al.*, 181 Ill. 35-43.

Durkee v. *The People*, 155 Ill. 354.

Farson v. *Fogg*, 205 Ill. 326.

Steele v. *Fraternity Tribunes*, 215 Ill. 190.

Stacey v. *Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546.

Converse v. *Emerson T. & Co.*, 242 Ill. 619.

Fritz v. *Equitable B. & L. Co.*, 186 Ill. 183, 198.

Best Brewing Co. v. *Klassen*, 185 Ill. 37.

Knass v. *Madison & Kedzie State Bank*, 354 Ill. 554.

In the recent decision of this Court in the case of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, involving the *ultra vires* acts of a National Bank in pledging assets to secure a private deposit, the Court at page 260 says:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised."

Perhaps the most frequently quoted statement of this rule which has been consistently followed by this Court and by the Supreme Court of Illinois is from *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24, pages 59, 60 and 61, and is as follows:

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:
>
> A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.
>
> When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other

party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

IV.

IMPLIED ASSUMPSIT.

Petitioner was limited by his affidavit of claim to a recovery upon the repurchase agreement alone and the question of recovery on an implied promise was not an issue in the case.

It is claimed by petitioner that even though the repurchase agreement is void, he is nevertheless entitled to recover the purchase price paid for the bonds and this apparently without a return of the bonds and at a time long distant from the time of purchase and after investment securities of all kinds have greatly declined in value.

Petitioner has cited in this connection a number of cases involving questions of unjust enrichment; cases where a corporation obtained money or property on its own void obligation alone. In such cases the courts have indicated that a recovery may be had upon the implied promise to pay for benefits received. These cases are different from the pending case where the bonds were not the obligations of the defendant bank but of another corporation, which were purchased by the bank and sold to the plaintiff. There is no allegation that they were sold at a profit. However, a detailed consideration of the cases cited is unnecessary as plaintiff in the case at bar based his right of recovery solely upon the repurchase agreement and its enforcement as a valid agreement. (See Appellate Court Opinion, Rec., 50.)

Plaintiff, with its declaration, filed an affidavit of claim (Rec., 4) in which he stated that his claim was for money—

"due and owing from the defendant to the plaintiff under its written agreement dated November 1st, 1929."

Defendant by its plea and affidavit of merits set up its defense that the alleged contract was *ultra vires* and void.

The Illinois courts have interpreted the provisions of Section 55 of the 1907 Practice Act, Ch. 110, as limiting the issues made by the pleadings to only those that are supported by the respective affidavits of the parties.

In *Firestone Tire Company* v. *Ginsburg*, 285 Ill. 132, the Court, by Mr. Justice Cartwright, at page 136, says:

> "Another ground alleged for affirming the judgment is that the pleas answered only the special counts of the declaration on the notes, and there being no plea on file to the common counts the judgment can be sustained upon that ground. The notes were admissible in evidence under the common counts, but the affidavit of claim made by the plaintiff showed that the action was on the notes and stated the amount due thereon, and the bill of exceptions shows that the notes were the basis of the judgment. There was no affidavit of any claim based on the common counts although the notes would be admissible under them, and the plaintiff's action was without any affidavit of claim except upon the promissory notes. The plaintiff was required to state in its affidavit the nature of its demand, and having stated it, all that was required of the defendant was to meet that statement by his affidavit."

So in the case of *Grant Keime* v. *Frank Thum, et al.*, 238 Ill. App. 519, it was held that there could be no recovery under the common counts on an implied contract where the affidavit of claim set up an express contract, and in that case the Court at page 522 says:

> "The consolidated common counts were filed, stating in nine different, general and indefinite forms the demand of the plaintiff. But the affidavit of plaintiff's claim eliminated all counts except that for 'goods, chat-

tels and effects before that time sold and delivered by plaintiff to defendants at their request.' That count was by affidavit rendered certain and definite in all the terms authorizing a recovery. By it the quantity of corn sold and delivered, the price per bushel, and the express agreement of defendants to pay the price, were explicitly stated, and the amount due under those terms. Under the elementary principles of procedure he could recover only upon proof of those terms by a preponderance of the evidence if challenged, as they were, by an appropriate plea supported by an affidavit of merits of the defense stated in the plea. *Reddig* v. *Looney*, 208 Ill. App. 413. Upon this state of the record the parties went to the jury."

Other cases holding that recovery and proof are limited to the affidavit of claim are as follows:

In *Goddard Tool Co.* v. *Crown Electrical Mfg. Co.*, 219 Ill. App. 34, in the opinion by Mr. Justice Heard, it is said:

"We have set forth the affidavits of claim and of merits in so much detail for the reason that by section 55 of chapter 110, Rev. Stats. of Illinois (I. & A. 8592), the respective parties are limited in their evidence to the matters controverted by the affidavits. *Reddig* v. *Looney*, 208 Ill. App. 413; *Miller* v. *Thomas*, 200 Ill. App. 125."

George W. Reddig, et al., v. *John Looney*, 208 Ill. App. 413 (on pp. 419, 420):

"The rule above stated will not result in trying cases on issues formed by an affidavit of claim and an affidavit of merits. Though actions at law in the Circuit Court are to be tried upon the pleadings, yet under this statute the parties are limited also by their affidavit. Plaintiff can prove and recover only what is stated in his affidavit of claim, but he cannot prove and recover even that unless he has an appropriate declaration on that cause of action. Defendant can only prove such defense as is stated in his affidavit of merits, but he cannot prove that or have a verdict upon that unless he has a pleading appropriate to that defense. The proof and the verdict must be under proper pleadings, but

no proof can be admitted or availed of under the pleadings unless it is supported by a proper affidavit."

This case (*Reddig* v. *Looney*) is cited with approval in an opinion of the Appellate Court of the first district in which all the authorities are reviewed. In this case, *Theron P. Cooper* v. *John A. Anderson*, 246 Ill. App. 1, the Court, on page 11, referring to said Section 55, says:

> "It is true that the affidavits do not take the place of the pleading, but the evidence to be offered and the issues to be tried are limited to the issues as made by the pleas as verified by the affidavits."

The record does not present to this Court any question as to the right of petitioner to maintain any action independently of the contract. Under like circumstances the Courts have refused consideration of this question.

In *Mercantile Trust Co.* v. *Kastor*, 273 Ill. 332, a similar situation existed and the Court after discussing the rule governing recovery on an implied contract for benefits received said at page 344:

> "This suit is brought against the defendant in error, however, upon his guaranty of the unlawful contract and not upon the implied contract. The trial court erred in instructing the jury. It should have given the instruction to find the verdict for defendant."

In *Hoffman* v. *Sears Community Bank*, 356 Ill. 598, the cause of action was based solely upon a repurchase agreement and a recovery by plaintiff below was reversed, and judgment given by the Supreme Court for defendant for costs.

In the *"Knass"* case, 354 Ill. 554, the Court refused the specific performance of a similar repurchase agreement and as the bill was based solely upon the void contract, it was ordered that the judgments of the lower courts be

reversed and the cause remanded with directions to dismiss complainant's bill for want of equity.

In *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24, the Court at page 61, says:

> "Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for."

In *De La Vergne Refrigerating M. Company* v. *German Savings Institution*, 175 U. S. 40, the Court after holding that the contract involved was *ultra vires*, said on page 59:

> "As the action in this case *is upon the contract* and as the contract is prohibited by the charter of the refrigerating company there can be no recovery on it."

CONCLUSION.

We have shown that this Court is without jurisdiction to issue the writ of certiorari herein because the discretion of the Supreme Court of Illinois as to whether it should review the judgment of the Appellate Court was never properly invoked, and because there is in the record no affirmative showing as to method by which it was sought to invoke such discretion. We have also shown that the federal question involved is not a substantial one and that the decision thereof by the state court is in accord with the applicable decisions of this Court. The repurchase agreement of November 1, 1929, is clearly *ultra vires* and against

public policy and is not barred as a defense by the doctrine of estoppel.

The record does not present the question as to whether there can be a recovery independently of the contract.

We therefore ask that petitioner's prayer for the issuance of the writ of certiorari be denied.

Respectfully submitted,

DANIEL M. HEALY,
Attorney for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,

Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

I.

ULTRA VIRES.

The repurchase agreement was clearly ultra vires and in direct violation of the National Bank Act.

Respondent, a National Bank, had only the powers conferred upon it by the "National Bank Act" (5136 of the Revised Statutes). The powers conferred upon National Banks by Section 7 of this Act, so far as applicable here, are as follows:

> "*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all

such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title; *Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities.*"

The portion in italics was first added by the Act of Congress of February 25, 1927, amending said section.

This amendment to the National Bank Act made in 1927 placed an express prohibition upon transactions such as are here involved. It specifically limits the purchase and sale of investment securities to "*buying and selling without recourse marketable obligations.*"

While the term "without recourse" may have a well settled meaning when applied to the endorser of a negotiable instrument as is indicated by the authority cited by petitioner, it is also true, as is indicated by that same authority, that when otherwise employed these words "have no *exact* legal significance." *Thompson* v. *First State Bank*, 102 Ga. 696.

In *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, at page 699, it is said:

> "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

It clearly appears that these words, "without recourse," as used in the National Bank Act, are not to be restricted or limited to the obligation of an indorser. This is made plain by an examination of the Act itself. The restriction applies to the sale of "*marketable obligations* • • • in the form of bonds, notes and/or debentures commonly known as *investment securities.*"

The sale of securities of this character seldom if ever require the endorsement of the seller. They are almost invariably payable to bearer and title passes by delivery. The requirement of the Statute must therefore be that the sale be *without recourse* in the ordinary meaning of the term, and would prevent the incurring of any contractual obligation by a national bank in connection with the sale by it of such securities.

A further examination of this amendment to the National Bank Act shows even more clearly the intended meaning of the term "without recourse." The restriction in question applies not only to *selling* of marketable investment securities but to the *buying* of such securities as well. The language of the statute is "that the business of buying and selling investment securities shall hereafter be limited to *buying* and selling *without recourse.*"

Of course there can be no contention that any obligation of an endorser is involved when the term "without recourse" is applied to a purchaser. The only way that a purchaser could give recourse to a seller would be by some contractual arrangement such as to resell at a specified price or to share profits realized. If the terms "without recourse" be interpreted as preventing a purchaser from entering into a resale contract, they should also be interpreted as preventing a seller from entering into a repurchase contract.

The repurchase agreement here involved was given with the very apparent intention of affording to the purchaser of the bonds, recourse against the seller in the event that they were not paid by the maker at maturity. The language used is:

> "Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000 and accrued interest."

The time for repurchase specified is "*at maturity.*" The contingency provided is the "*desire*" of the purchaser. Of course the only occurrence at *maturity* that could create a *desire* to sell the bonds would be the failure of the maker to pay. The contract permits the purchaser of the bonds to hold the same until maturity in spite of any decrease in their market value and, after collecting interest thereon during the full period, to collect their par value and accrued interest from the bank, while the bank is powerless to in any way protect itself from any loss.

In *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554, the court with reference to a similar repurchase agreement at page 566 said:

> "Speculation by a banking corporation with the funds deposited with it and its entry into the guaranty or surety business are neither within the principles of sound banking business nor the powers conferred by the statute under which it is organized, yet to insure the price of bonds, as was attempted by this agreement, is nothing short of a guaranty and possesses an inherent evil not found even in speculation, in that the bank cannot hope to re-purchase such bonds while they command a market price higher than that fixed in such agreement, hence no chance of gain exists. The guaranty of such bonds is not a transaction ordinarily and commonly considered to be within the scope of general banking business as that term is commonly used and understood, and cannot be said to come within the

power conferred by the statute quoted, to do a general banking business. Nor is such power a necessary incident to the powers granted."

Greene v. *First National Bank*, 172 Minn. 310, involved a repurchase agreement given by a national bank under circumstances similar to those involved in the case at bar. The federal statute, there considered, permitting national banks, doing business in a place having a population not in excess of five thousand inhabitants, to act as a broker with reference to loans on real estate located within one hundred miles of the place where the bank was located. This statute provided, however, "that no such bank shall in *any case* guarantee either the principal or interest of any such loans." The court in this connection said:

> "In the case at bar the defendant did not act as a broker or agent. It made the loans for itself and they became part of its assets. In selling the mortgages defendant dealt with its own property. Nevertheless we think that defendant was prohibited by the act from guaranteeing payment of the principal or interest of the loans. The words italicized indicate that it was the policy of Congress to prohibit national banks from guaranteeing notes secured by real estate mortgages in any case whatever. If we are right in this conclusion, the bank had no authority to enter into contracts for the repurchase of such notes and mortgages, *for the objections to such contracts are even greater than to those of one of guaranty.*"

It is further contended by petitioner that the repurchase agreement constitutes the entire transaction a conditional sale and consequently a sale without recourse. This seems to be a contradiction of terms. If the sale was a conditional sale, the very essence and object thereof would have been to afford recourse to the purchaser. It certainly would not have brought the transaction within the limitation of the statute requiring that the "business of buying and selling

* * * be hereafter *limited* to buying and selling without recourse." But the decision of this question in *Knass* v. *Madison and Kedzie Bank,* 354 Ill. 554, should be conclusive that the repurchase agreement here was not a conditional sale. Here as in the "Knass" case the bank, by the terms of the written agreement, agreed to repurchase the bonds sold at a specified price. Here also the agreement recites the payment of the purchase price in full by the purchaser, who is under no obligation to return the bonds or the interest received but may dispose of them as he sees fit. Here again title passed to the purchaser without any condition remaining to be discharged. Under these circumstances the Court in the *Knass* case held that the transaction was not a conditional sale.

The court there, at page 570, said:

> "Counsel for complainants also argue that this agreement was not a repurchase contract but a conditional sales contract; that the bonds were taken on condition that they might be returned, and that such a contract is enforceable. They cite *Wolf* v. *National Bank of Illinois,* 178 Ill. 85, and *Stewart* v. *Dobson,* 282 *id.* 192. In the former case the contention was that contracts similar in terms to those before us were options and gambling contracts. The court held, however, that the record showed that it was the intention of the parties that the purchaser was to be allowed a certain time in which to elect whether he was to keep or return them, and so the transaction was a conditional sale. Such are not the facts here, but it is evident that complainants and the bank considered that the sale was completed and by a separate agreement the bank agreed to repurchase the bonds. Such does not constitute a conditional sale. It was also there held that the transaction was not a gambling contract prohibited by section 130 of the Criminal Code. The statute for the protection of bank depositors was not called to the attention of the court. *Stewart* v. *Dodson, supra,* involved a contract for repurchase between indi-

viduals and no question of limitation of powers arose. The question there was whether the agreement was a gambling contract, prohibited by section 130 of the Criminal Code. These cases are not controlling here. It seems clear here that both the evidence of the transaction itself and the theory on which the bill is brought preclude a construction of these agreements as conditional sales contracts."

Of the Illinois cases cited by petitioner at the top of page 12 of his brief, the first and last cases are the only ones involving questions of corporate power and have both been overruled by the *Knass* case, 354 Ill. 554. An application for the review of the *Knass* case by the United States Supreme Court was refused. 291 U. S. 660.

It is suggested by attorney for petitioner that there is a distinction between the *Knass* case and the case at bar in that the bank in the *Knass* case acted only as a broker and received as its profit from the transaction, the commission agreed upon for the sale of the securities. We do not understand these to be the facts. The Supreme Court of Illinois did point out in its opinion that the bonds were the obligations of the corporations that owned the real estate and signed the bonds and in that sense were NOT THE BONDS OF THE BANK. There is also reference made to the fact that the bank MAY have received a commission for them although there is nothing in the record to show that fact. However, the method pursued by banks in underwriting real estate loans is a matter of common knowledge, and the fact that the bank's service or profit for loaning its own money and selling the bonds is commonly referred to as a commission does not render any the less true the fact that the bonds were the property of the bank. Nor does it make any difference in the principle involved whether the bank underwrote a bond issue or purchased the bonds

on the open market. The loss to the bank would be the same if it was forced to repurchase when the market value was as a result of economic conditions greatly below the stipulated repurchase price.

Attorneys for appellee seek further to avoid the force of the decision in the "*Knass*" case by attempting to uphold the same on grounds more agreeable to their contentions than those adopted by the court. They claim the repurchase agreement in that case was *ultra vires* because the bank was not authorized by the statute to buy real estate mortgage bonds under any circumstances. However, it is provided by the statute which they quote, that the bank "shall have the power to loan money on personal and real estate security." The purchase of real estate mortgage bonds should certainly be considered loaning money on real estate security.

It was the apparent intention of Congress in making the said amendment to the National Bank Act to prevent by an all inclusive provision the possibility of national banks incurring a contingent liability with reference to investment securities which they purchased or sold. The wisdom of this legislation cannot be doubted in the light of the recent rapid change in the value of securities, which has demonstrated that such contingent liabilities if extensively incurred would be disastrous to any bank. Against this contingent liability the bank is powerless to take necessary steps for its protection. The maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government. It may also cause a great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

In the face of this enactment by Congress, little weight should be given to the argument that the said provision does not mean what it so clearly states in simple and easily understood language, or that notwithstanding such provisions the right to incur this contingent liability is necessarily incident to the right to sell, and that while specifically prohibited, it is impliedly permitted by the National Bank Act.

In *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554, the court discussed the act of the Illinois legislature enacted for the same purpose as was the 1927 Amendment to the National Bank Act, and with reference thereto the court at page 567 said:

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Re-statement of the Law of Contracts, Am. Law Inst., sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. Agreements such as are here involved fall within that category. Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void though there be found no specific statutory prohibition against them. It is an academic rule of law that from the constitution and statutory enactments may be gleaned the public policy of the State. The General Assembly of this State in 1879 passed an act entitled, 'An act for the protection of bank depositors,' approved June 4, 1879. (Smith's

Stat. 1931, Chap. 38, Par. 64.) Section 4 of this act is as follows: 'It shall not be lawful for any savings bank, individual or individuals doing banking business, banking company, or incorporated bank receiving savings deposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or interest on, any bonds, notes or other evidence of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or guarantee, whereby such deposits or trust funds could be jeopardized or impaired shall be null and void.' This section has not heretofore been construed by this court. It seems clear, however, that payment or assumption of or guaranteeing to pay bonds of the character here involved is of the gist of the prohibition of this act applicable in any case where by any such contracted liability the deposits or the trust funds of the bank could become jeopardized or impaired. The act for the protection of bank depositors evidences an intention on the part of the legislature to declare contracts of the character before us void as against the public policy of the State. That act, section 4 of which is herein quoted, was enacted, as the title indicates, for the protection of bank depositors. Its enactment was for the public generally and should be construed to carry out that purpose. *People* v. *Tallmadge,* 328 Ill. 210."

It is suggested by attorney for petitioner that the creation of such contingent liabilities is not necessarily dangerous, as the bank might protect itself by establishing *"a reserve against the maturity of such liability."* The fact alone that transactions of this character would make necessary such a reserve is a sufficient inducement for the action taken by Congress. The necessity of placing the proceeds of all bonds so sold in a reserve fund awaiting the maturity of the bonds would hardly commend itself as good or safe banking. It would require that large sums of the

bank's capital remain tied up and unused for long periods of time, and make their eventual availability as assets of the bank dependent upon the value of investment securities at the date of their maturity.

It will be observed that the grant of powers to national banks by the said National Bank Act before its amendment was substantially the same as the grant of powers by Banking Act of Illinois approved June 23, 1919, which was the subject of construction by the Supreme Court of Illinois in *Knass* v. *Madison and Kedzie Bank,* 354 Ill. 554.

It was there held by the Court that the term "general banking business" includes only such powers as are ordinarily conferred upon and used by banks such as loaning money, discounting notes, receiving deposits and dealing in commercial paper; and further that a repurchase agreement similar to the one involved in this case is not within the scope of a general banking business and is not within any of the powers conferred by the said State Banking Act, but is against public policy as it jeopardizes and impairs deposits and results in injury to depositors and the public.

The position taken by the Court in the *Knass* case has been reaffirmed in the recent case of *Hoffman* v. *Sears Community Bank,* 356 Ill. 598, where the Court stated that it adhered to the legal conclusions reached therein.

It follows that even without the amendment of 1927 the National Bank Act did not confer upon the national bank the power to enter into the repurchase agreement.

This interpretation was given to the National Bank Act by the Supreme Court of Minnesota in the case of *Greene* v. *First National Bank,* 172 Minn. 310, which was decided prior to the said amendment. In that case the Court said:

"But a guaranty of commercial paper sold by a bank

and a contract to repurchase real estate mortgages which the bank has sold stand on a different footing. As was said in *Eberlein* v. *Stockyards Mortg. & T. Co., supra,* to agree to repurchase on demand, and at face value securities the bank sells subjects it to a contingent liability, the sudden maturing of which, by the concurring demands of a large number of purchasers, may easily absorb its capital instantaneously. Paraphrasing the language of *Farmers' & M. Sav. Bank* v. *Crookston State Bank, supra,* it may be said that every bank is charged with duties to the public. A bank is more than a mere private corporation for pecuniary profit. A national bank is under the supervision of the federal authorities. A contract to repurchase real estate mortgages which the bank has sold is in defiance of safe banking, tends to injure the depositors of the bank, and is contrary to public policy.

The power to contract for the repurchase of a loan secured by a real estate mortgage is not expressly conferred by the National Banking Act. Neither is it incidental to those expressly conferred. *California Nat. Bank* v. *Kennedy,* 167 U. S. 362, 371, 42 L. ed. 198, 202, 17 Sup. Ct. Rep. 831, is a case dealing with the acquisition by a national bank of stock in another corporation. It was held that such banks do not possess the power to deal in stocks, and that an implied prohibition against such dealings resulted from the failure of Congress to grant the power. That doctrine is applicable here. National banks are not expressly authorized to make such contracts as defendant is alleged to have made. The failure to grant the power negatives its existence, for the power is of such a nature that it is not to be inferred in the absence of language clearly indicating its existence."

In *Weckler* v. *First National Bank,* 42 Md. 585, which was a case where the plaintiff, Weckler, brought suit against the First National Bank to recover the sum of one thousand dollars paid to the bank for bonds of the Northern Pacific R. R. Company, alleging that the sale was procured by false, fraudulent and deceitful representations made

by the bank's teller, the trial court instructed the jury that as the defendant was organized under the National Banking Act, the purchase and sale of bonds was not within its chartered powers and the plaintiff could not recover. The court of appeals after reviewing the powers of National Banks under the National Banking Act says, on page 595:

> "We are, therefore, clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. 8 G. & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the Court's instruction to the jury nor in the rejection of the appellant's first and second prayers."

To the same effect are the following:

Hotchkin v. Third National Bank of Syracuse, 219 Mass. 234.

First National Bank of Allentown v. *Hoch*, 89 Pa. State 324.

The amendment to the National Bank Act made in 1927 placed an express prohibition upon transactions such as are here involved. It specifically limits the purchase and sale of investment securities to "*buying and selling without recourse marketable obligations.*"

II.

ESTOPPEL.

A contract of a corporation which is ultra vires in the sense that it is beyond the powers conferred upon it by the legislature is not voidable only, but wholly void and of no legal effect and the corporation is not estopped from urging this defense.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245.

Central Transportation Co. v. *Pullman Car Co.*, 139 U. S. 24-59.

California National Bank v. *Kennedy*, 167 U. S. 362.

First National Bank v. *Converse*, 200 U. S. 425-439.

Merchants National Bank v. *Wehrman*, 202 U. S. 295.

De La Vergne Refrigerating M. Co. v. *German Savings Institution*, 175 U. S. 40-58.

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Fritz v. *Equitable B. & L. Co.*, 186 Ill. 183, 198.

Best Brewing Co. v. *Klassen*, 185 Ill. 37.

Knass v. *Madison & Kedzie State Bank*, 354 Ill. 554.

Counsel for petitioner seek to avoid the principle established in the foregoing cases, to the effect that a corporation is not estopped from urging the defense of *ultra vires* to the attempted enforcement of a contract that is beyond the powers conferred, by contending that the making of the repurchase agreement here involved was merely the abuse of a granted power. There are undoubtedly certain so-called *ultra vires* acts which are within the *general authority* of a corporation and which people dealing in good faith with the corporation have a right to assume have been properly performed by the proper officers of the corporation. Where these acts are improperly or irregularly performed and the corporation benefits therefrom, it may be estopped from urging such irregularity as a defense. But the *ultra vires* act here involved is one which is not within the *general authority* of the corporation but is outside that authority and specifically prohibited by law.

There is not even a grant of the *general* power of purchase and sale of investment securities given to national banks by the National Bank Act. The Act specifically provides that the business of buying and selling such securities "shall be *limited* to buying and selling without recourse." But there would not be implied from a grant of general power to buy, even if it were given, the authority to make a repurchase agreement such as we have here.

We have shown that the power to guarantee the payment of bonds is not a necessary incident to their sale and will not be recognized as a banking power in the absence of a specific grant.

In the "Knass" case repurchase agreements like the one here involved are construed as being guaranties and against public policy, and in the case of *Greene* v. *First National Bank*, 172 Minn. 310, such contracts are considered as being

more objectionable than guaranties and not within the scope of general banking business.

If counsel's argument in this respect were followed, almost any violation by a bank of its statutory powers could be upheld as being merely the abuse of a granted power. Take as an illustration, the pledging by a bank of its assets to secure a private deposit. It would be contended that, as the bank had granted power to accept deposits and had granted power to make contracts, the contract giving its own property as security for private deposits was at most an abuse of those powers.

This, however, was not the view taken by this Court in its recent decision in the case of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, where it was held that this power of pledging assets to secure a private deposit was not conferred by the National Bank Act but was *ultra vires* and unenforceable, and in considering the principle of estoppel as applied thereto the Court, at page 260, said:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires contract*, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised."

A frequently quoted statement of this rule which has been consistently followed by this Court and by the Supreme Court of Illinois is from *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24, pages 59, 60 and 61, and is as follows:

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:
>
> A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of

its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

III.

IMPLIED ASSUMPSIT.

A.

Petitioner was limited by his affidavit of claim to a recovery upon the repurchase agreement alone and the question of recovery on an implied promise was not an issue in the case.

It is claimed by petitioner that even though the repurchase agreement is void, he is nevertheless entitled to recover the purchase price paid for the bonds and this apparently without a return of the bonds and at a time long distant from the time of purchase and after investment securities of all kinds have greatly declined in value.

Petitioner has cited in this connection a number of cases involving questions of unjust enrichment; cases where a corporation obtained money or property on its own void obligation alone. In such cases the courts have indicated that a recovery may be had upon the implied promise to pay for benefits received. These cases are different from the pending case where the bonds were not the obligations of the defendant bank but of another corporation, which were purchased by the bank and sold to the plaintiff. There is no allegation that they were sold at a profit. However, a detailed consideration of the cases cited is unnecessary as plaintiff in the case at bar based his right of recovery solely upon the repurchase agreement and its enforcement as a valid agreement. (See Appellate Court Opinion, Rec., 50.)

Plaintiff, with its declaration, filed an affidavit of claim (Rec., 4) in which he stated that his claim was for money—

> *"due and owing from the defendant to the plaintiff under its written agreement dated November 1st, 1929."*

Defendant by its plea and affidavit of merits set up its defense that the alleged contract was *ultra vires* and void.

Section 55 of the 1907 Practice Act of Illinois provides:

> "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion

specifying the amount (according to the best of his judgment and belief), * * *."

The foregoing provisions have been conclusively determined by the Illinois courts as limiting the issues made by the pleadings to only those that are supported by the respective affidavits of the parties. It was the purpose of the Act to make possible the limitation of the issues to matters that could be supported by evidence and to sift out allegations on each side such as are referred to by counsel as of the "catchall" variety. In this way it was anticipated that there might be secured a speedier termination of suits.

In *Firestone Tire Company* v. *Ginsburg*, 285 Ill. 132, the Court, by Mr. Justice Cartwright, at page 136, says:

> "Another ground alleged for affirming the judgment is that the pleas answered only the special counts of the declaration on the notes, and there being no plea on file to the common counts the judgment can be sustained upon that ground. The notes were admissible in evidence under the common counts, but the affidavit of claim made by the plaintiff showed that the action was on the notes and stated the amount due thereon, and the bill of exceptions shows that the notes were the basis of the judgment. There was no affidavit of any claim based on the common counts although the notes would be admissible under them, and the plaintiff's action was without any affidavit of claim except upon the promissory notes. The plaintiff was required to state in its affidavit the nature of its demand, and having stated it, all that was required of the defendant was to meet that statement by his affidavit."

So in the case of *Grant Keime* v. *Frank Thum, et al.*, 238 Ill. App. 519, it was held that there could be no recovery under the common counts on an implied contract where the affidavit of claim set up an express contract, and in that case the Court at page 522 says:

"The consolidated common counts were filed, stating

in nine different, general and indefinite forms the demand of the plaintiff. But the affidavit of plaintiff's claim eliminated all counts except that for 'goods, chattels and effects before that time sold and delivered by plaintiff to defendants at their request.' That count was by affidavit rendered certain and definite in all the terms authorizing a recovery. By it the quantity of corn sold and delivered, the price per bushel, and the express agreement of defendants to pay the price, were explicitly stated, and the amount due under those terms. Under the elementary principles of procedure he could recover only upon proof of those terms by a preponderance of the evidence if challenged, as they were, by an appropriate plea supported by an affidavit of merits of the defense stated in the plea. *Reddig* v. *Looney*, 208 Ill. App. 413. Upon this state of the record the parties went to the jury."

Other cases holding that recovery and proof are limited to the affidavit of claim are as follows:

In *Goddard Tool Co.* v. *Crown Electrical Mfg. Co.*, 219 Ill. App. 34, in the opinion by Mr. Justice Heard, it is said:

"We have set forth the affidavits of claim and of merits in so much detail for the reason that by section 55 of chapter 110, Rev. Stats. of Illinois (I. & A. 8592), the respective parties are limited in their evidence to the matters controverted by the affidavits. *Reddig* v. *Looney*, 208 Ill. App. 413; *Miller* v. *Thomas*, 200 Ill. App. 125."

George W. Reddig, et al., v. *John Looney*, 208 Ill. App. 413 (on pp. 419, 420):

"The rule above stated will not result in trying cases on issues formed by an affidavit of claim and an affidavit of merits. Though actions at law in the Circuit Court are to be tried upon the pleadings, yet under this statute the parties are limited also by their affidavit. Plaintiff can prove and recover only what is stated in his affidavit of claim, but he cannot prove and recover even that unless he has an appropriate declaration on that cause of action. Defendant can only prove such

> defense as is stated in his affidavit of merits, but he cannot prove that or have a verdict upon that unless he has a pleading appropriate to that defense. The proof and the verdict must be under proper pleadings, but no proof can be admitted or availed of under the pleadings unless it is supported by a proper affidavit."

This case (*Reddig* v. *Looney*) is cited with approval in an opinion of the Appellate Court of the First District in which all the authorities are reviewed. In this case, *Theron P. Cooper* v. *John A. Anderson*, 246 Ill. App. 1, the Court, on page 11, referring to said Section 55, says:

> "It is true that the affidavits do not take the place of the pleading, but the evidence to be offered and the issues to be tried are limited to the issues as made by the pleas as verified by the affidavits."

B.

By taking judgment on his affidavit of claim based solely upon the repurchase agreement petitioner abandoned any possible claim or recovery independently of that agreement.

When this case was remanded by the Appellate Court to the trial court after the reversal of the judgment in favor of respondent, it was redocketed in the trial court and the petitioner moved the court to strike respondent's affidavit of merits for insufficiency and for a *judgment on the affidavit of claim*, and thereupon the final judgment order of April 15, 1932, was entered. This judgment order recited that the matter came on to be heard on motion of plaintiff's attorneys to strike the affidavit of merits for insufficiency upon the remandment and reversal by the Appellate Court in accordance with the opinion rendered by it and for a judgment as of default on the *affidavit of claim*. It ordered the affidavit of merits stricken and found that,

from the *affidavit of claim*, there was due plaintiff $37,085.41, together with interest, for which judgment was given. (Rec., 7 and 8.)

This affidavit of claim on which the judgment was entered stated that plaintiff's demand was for $37,085.91 due and owing from the defendant to the plaintiff "*under its written agreement* dated Nov. 1, 1929." (Rec., 4.)

It thus appears that the petitioner by his own action and on his own initiative elected to base his recovery solely on the repurchase agreement and abandoned any claim of recovery independently thereof. Of course, as we have already shown, petitioner had already limited himself to such a recovery by his affidavit of claim. But counsel on page 21 of their brief contend that this affidavit was filed to the special count alone and that no affidavit was filed to the common counts, thereby implying, we assume, that there could still be a recovery under the common counts independently of the repurchase agreement. We do not agree with this contention but, assuming that it were correct, *by the election of petitioner there was no such recovery.* The record clearly shows that this action was brought and prosecuted for the sole purpose of recovering under the provisions of the *ultra vires* repurchase agreement.

C.

As this action was brought for the sole purpose of recovering under the terms of an ultra vires contract this court should not give consideration to the question as to whether petitioner might have maintained an action independently of the contract.

It is clear that there could not be a recovery both upon the express repurchase agreement and upon an implied

agreement for money had and received. The affidavit of claim, the motion of petitioner's attorney for judgment, and the judgment of the court all show that no question was raised or considered in the trial court as to the right of petitioner to maintain an action independently of the contract. Under like circumstances courts of review have refused consideration of this question.

In *Mercantile Trust Co.* v. *Kastor,* 273 Ill. 332, a similar situation existed and the Court after discussing the rule governing recovery on an implied contract for benefits received said at page 344:

> "This suit is brought against the defendant in error, however, upon his guaranty of the unlawful contract and not upon the implied contract. The trial court erred in instructing the jury. It should have given the instruction to find the verdict for defendant."

In *Hoffman* v. *Sears Community Bank,* 356 Ill. 598, the cause of action was based solely upon a repurchase agreement and a recovery by plaintiff below was reversed, and judgment given by the Supreme Court for defendant for costs.

In the *"Knass"* case, 354 Ill. 554, the Court refused the specific performance of a similar repurchase agreement and as the bill was based solely upon the void contract, it was ordered that the judgments of the lower courts be reversed and the cause remanded with directions to dismiss complainant's bill for want of equity.

In *Central Transportation Company* v. *Pullman's Palace Car Company,* 139 U. S. 24, the Court at page 61, says:

> "Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit,* or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, ac-

cording to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for."

In *De La Vergne Refrigerating M. Company* v. *German Savings Institution*, 175 U. S. 40, the Court after holding that the contract involved was *ultra vires*, said on page 59:

> "As the action in this case *is upon the contract* and as the contract is prohibited by the charter of the refrigerating company there can be no recovery on it."

However, a recovery in general assumpsit could not be sustained, even if the question was before the court on the record. Any such claim would arise out of a transaction which was prohibited by law and against public policy. Under these circumstances a court will not give assistance to either party but will leave them where it finds them.

We have already called the court's attention to the position taken by the Supreme Court of Illinois in the "Knass" case, where it states that such contracts are void as against public policy and as violative of statutory enactment, that

> "Contracts against public policy are generally *unenforcible by any remedy*. (Restatement of the law of contracts, Am. Law Ins., Sec. 369.)"

Courts generally have taken this position that they cannot assist a plaintiff to get payment for efforts to accomplish what the law declared should not be done and that no recovery can be had therefor either on the express contract, or on an implied contract or on *quantum meruit*.

De Kam v. *City of Streator*, 316 Ill. 123.

Charles W. Flack, et al. v. *John S. Warner, et al.*, 278 Ill. 368.

Norbeck & Nicholson Company v. *State of South Dakota*, 32 S. D. 189.

Gibbs v. *Baltimore Gas Co.*, 130 U. S. 396.
M. Hunter v. *Pearl L. Wheate*, 289 Fed. 604.
Ernest J. Seitz v. *Theodore Michel* (Minn. Supreme Ct.), 181 N. W. 102.

CONCLUSION.

We therefore respectfully submit that the written agreement of November 1, 1929 was in conflict with and prohibited by the provisions of Section 5136 of the Revised Statutes of the United States as Amended in 1897; that there can be no enforcement of such an agreement as it is *ultra vires*, illegal and against public policy; that the plaintiff's action was on this contract and he was limited by his affidavit of claim to a recovery thereon; that the question as to whether the plaintiff could maintain any action against the defendant independently of this contract was not presented to or considered by the trial court and cannot be raised here.

We therefore respectfully ask that the judgment of the Appellate Court of Illinois, First District, be affirmed.

Respectfully submitted,

DANIEL M. HEALY,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 661.—October Term, 1934.

Leo Awotin, Petitioner, *vs.* Atlas Exchange National Bank of Chicago.	On Writ of Certiorari to the Appellate Court, First District, State of Illinois.

[April 29, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, — U. S. —, to review a determination of the Appellate Court, First District, of the State of Illinois, that respondent, a national banking association, has incurred no liability in consequence of the failure to perform its contract with the petitioner, declared by the court to be invalid because in violation of R. S. § 5136, as amended February 25, 1927, c. 191, § 2, 44 Stat. 1224, 1226.

On November 1, 1929, petitioner purchased of respondent at par thirty-five $1,000 Mortgage Bonds of the First National Company Collateral Trust. Contemporaneously with the purchase, and as an inducement and part consideration for it, respondent agreed in writing at petitioner's option to repurchase the bonds at maturity, at par and accrued interest. Petitioner's declaration in several counts set up, in special assumpsit, respondent's breach of the express contract to repurchase the bonds, and, in general assumpsit, the obligation of respondent to return the sum received for the bonds. Judgment of the trial court for petitioner on the pleadings, overruling the defense that the contract was *ultra vires* and void, was reversed by the Appellate Court, 275 Ill. App. 530, and the Supreme Court of the State denied leave to appeal.

Revised Statutes, § 5136, authorizes national banks to carry on a banking business and defines their powers. By the amendment of February 25, 1927, a proviso was added to paragraph (7), reading:

"*Provided*, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any

person . . . or corporation, in the form of bonds, notes, and/or debentures, commonly known as investment securities. . . ."

It is the contention of petitioner that respondent's contract to repurchase the bonds was incidental to its authority to do a banking business and was not forbidden by the proviso, that in any case respondent is estopped to set up its invalidity, and that, even if the contract is held to be invalid, respondent is bound to make restitution of the purchase price.

1. Petitioner insists that the words of the statute, "without recourse," must be taken to have only the technical legal significance in which they are used to limit the liability of an endorser of negotiable paper, as meaning without liability as an endorser or guarantor of the obligation of a third party, and that respondent did not assume that form of liability by agreeing to repurchase the bonds. But when the words are read in their context, and in the light of the evident purpose of the proviso, it is apparent that they were intended to have a broader meaning and one more consonant with all the different forms of business to which the proviso relates.

The evil aimed at is concededly a consequence of either an endorsement or guaranty by the bank of the paper which it sells. Both are forms of contingent liability inimical to sound banking and perilous to the interest of depositors and the public. But the liability is the same, in point of substance and of consequences, whether it ensues from technical endorsements of negotiable paper which the bank has sold, or from any other form of contract by which the bank assumes the risk of loss which would otherwise fall on the buyer of securities, or undertakes to insure to the seller the benefit of an increase in value of securities which would otherwise accrue to the bank. See *Logan County National Bank* v. *Townsend*, 139 U. S. 67.

The proviso was the first express recognition of the authority of national banks to engage in the business of dealing in securities (see H. R. Report No. 83, p. 3; Sen. Report No. 473, p. 7, 69th Cong. 1st Sess.), and subjected the business to the limitation that it must be conducted without recourse. The limitation is expressly made applicable both to buying and selling "marketable obligations evidencing indebtedness in the form of bonds, notes or debentures." The words, if restricted in their meaning to the endorsement or guaranty of negotiable paper, could have no application to the purchase of such obligations, and normally would have sense to the sale

of bonds and debentures, which are usually negotiated without endorsement. A meaning is to be preferred, if reasonably admissible, which would permit their application, as the statute prescribes, to both forms of transactions and to all the specified classes of securities. Both the form and purpose of the statute impel the conclusion that the words were used in a broad and nontechnical sense, as precluding, at least, any form of arrangement or agreement in consequence of which the bank is obligated to save the purchaser harmless from loss incurred by reason of his purchase. See *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554; *Hoffman* v. *Sears Community Bank*, 356 Ill. 598; *Lyons* v. *Fitzpatrick*, 52 La. Annual, 697, 699; *Greene* v. *First National Bank*, 172 Minn. 310.

Respondent, by agreeing to repurchase the bonds at the same price petitioner had paid for them, plus their accrued interest, undertook to save petitioner harmless for all risk of loss on his purchase, as effectively as if it had endorsed the bonds without restriction or had guaranteed their payment at maturity. The contract was therefore one which the statute prohibits and for the breach of which the law affords no remedy.

2. The petitioner, who was chargeable with knowledge of the prohibition of the statute, may not invoke an estoppel to impose a liability which the statute forbids. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260; *California Bank* v. *Kennedy*, 167 U. S. 362; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 369; *First National Bank* v. *Converse*, 200 U. S. 425, 439, 440; *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295, 302.

3. The state court rejected the contention that it was the legal duty of respondent to make restitution to petitioner of the purchase price of the bonds which it had received in consideration of its invalid contract. We do not stop to consider how far the court, as is contended, based its decision upon procedural grounds, for it considered the merits and declared that no right arose upon an implied assumpsit although respondent had received the benefit of a contract which was *ultra vires* and void.

The opinion does not disclose whether this conclusion was rested upon the court's interpretation of rules of state law governing the *quasi* contractual right to compel restitution of the purchase price, or upon the court's construction of R. S. § 5136. If our jurisdiction depended upon its decision of the federal question, the opinion

fails to reveal whether it is the federal or the state question which was decided, see *Lynch* v. *New York*, 293 U. S. 52; compare *Logan County Bank* v. *Townsend, supra*, 72, 73. But we have jurisdiction of the cause to review the ruling of the state court that the express contract was rendered invalid by the federal statute. While we may not properly exercise our jurisdiction to review or set aside the state court's application of local law to the *quasi* contractual demand, we may, in the present ambiguous state of the record, appropriately determine whether the federal statute precludes recovery of the purchase money. We think that such is its effect.

The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. See *Logan County Bank* v. *Townsend, supra*, 74, 75; *Hitchcock* v. *Galveston*, 96 U. S. 341, 350. The contract is invalid because it is within the broad sweep of the statute which by mandatory language sets up definite limits upon the liability which may be incurred by a national bank, in the course of its business of dealing in securities, by confining the business to buying and selling "without recourse." The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of "recourse" growing out of the transaction of the business. See *Bank of United States* v. *Owens*, 2 Pet. 527, 537; *Brown* v. *Tarkington*, 3 Wall. 377, 381; *Thomas* v. *City of Richmond*, 12 Wall. 349, 356; *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 262. National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible.

Affirmed.